

LAW OFFICES OF  
**LOUIS E. GITOMER, LLC.**

LOUIS E. GITOMER  
Lou@lgraillaw.com

MELANIE B. YASBIN  
Melanie@lgraillaw.com  
410-296-2225

600 BALTIMORE AVENUE, SUITE 301  
TOWSON, MARYLAND 21204-4022  
(410) 296-2250 • (202) 466-6532  
FAX (410) 332-0885

February 8, 2012

23/824

Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

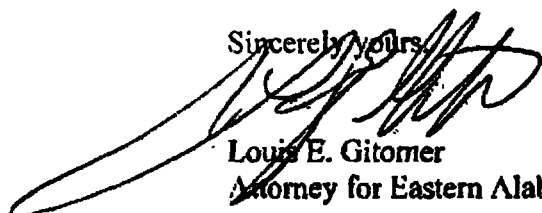
**RE: Finance Docket No. 35583, *Eastern Alabama Railway LLC v. Utilities Board of the City of Sylacauga***

Dear Ms. Brown:

Enclosed for efilng is the Opening Statement of the Eastern Alabama Railway LLC.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer  
Attorney for Eastern Alabama Railway LLC

Enclosure

**ENTERED**  
**Office of Proceedings**

**FEB 09 2012**

**Part of**  
**Public Record**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. FD 35583

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EASTERN ALABAMA RAILWAY LLC  
v.  
UTILITIES BOARD OF THE CITY OF SYLACAUGA

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EASTERN ALABAMA RAILWAY LLC OPENING STATEMENT

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Scott G. Williams Esq.  
Senior Vice President & General Counsel  
RailAmerica, Inc.  
7411 Fullerton Street, Suite 300  
Jacksonville, FL 32256  
(904) 538-6329

Louis E. Gitomer, Esq.  
Law Offices of Louis E. Gitomer  
600 Baltimore Avenue  
Suite 301  
Towson, MD 21204  
(410) 296-2250  
Lou@lgrailaw.com

Attorneys for: EASTERN  
ALABAMA RAILWAY LLC

Dated: February 8, 2012

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. FD 35583

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EASTERN ALABAMA RAILWAY LLC  
v.  
UTILITIES BOARD OF THE CITY OF SYLACAUGA

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EASTERN ALABAMA RAILWAY LLC OPENING STATEMENT

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The Eastern Alabama Railway LLC ("EARLY") respectfully requests the Surface Transportation Board (the "Board") to declare that the proposed condemnation of certain of its property by the Utilities Board of the City of Sylacauga, AL (the "Utilities Board") is preempted by federal law under 49 U.S.C. §10501.

EARLY is a Class III railroad that operates about 31 miles of track between Talladega and Gantts Quarry, AL. EARLY handles about 15,000 carloads per year.

EARLY has an established process for a party to seek permission to enter EARLY's property and use EARLY's property for some purpose.

An applicant may obtain a Utility Occupancy License (Wire or Pipeline) through a formal application process. To initiate the process the applicant must fully complete the application form (See Exhibit A). Incomplete applications which do not include railroad milepost information or railroad subdivision information will be rejected immediately.<sup>1</sup>

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<sup>1</sup> Although the application of the Utilities Board was not formally rejected due to the pendency of legal action, the proposed construction plans do not conform to engineering standards because they do not reflect that (1) the casing steel ASTM A252 will be Grade 2 or better in order to have a minimum of 35,000 psi tensile strength, (2) the casing has

The completed application and a non-refundable \$1,000 Application Fee, a non-refundable \$1,500 Engineering Review Fee via check or money order is required for processing. It is recommended that a Right of Entry application be submitted concurrently with the application for Utility Occupancy License. See Exhibit B for the Right of Entry application and explanation of the process.

Upon receipt of the application and fees, the real estate and engineering teams will review the package for approval. Application does not guarantee approval. If the application is approved, a Utility License agreement will be drafted and forwarded to the applicant for signature. The partially executed agreement must be returned to the Real Estate Department accompanied by the first year rental payment, deposit, and relevant proof of insurance (outlined in the agreement) prior to execution on behalf of the railroad.<sup>2</sup>

Once a Utility Occupancy License Agreement is executed, a Right of Entry permit must be secured to enter onto railroad property. A Right of Entry (ROE) or Contractor Occupancy/Access Agreement is a separate application by the contractor who is performing the work and requires the submission of a non-refundable \$1,500 processing fee (due when utility application submitted) for a sixty (60) day term.

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bituminous coating, (3) the casing is vented at each end outside the railroad right-of-way, and (4) right-of-way warning signs would be installed. The foregoing requirements exist to avoid interference with operations.

<sup>2</sup> A license agreement signed between the Alabama & Gulf Coast Railway LLC and the City of Atmore is attached as Exhibit D.

For "standard processing", the entire process takes between 4-8 weeks. "Expedited processing" will reduce the processing time to between 1-2 weeks and costs an additional \$1,750.

The Utilities Board began this process, but was unwilling to pay any compensation for use. See July 8, 2011 letter from David Burkholder in Exhibit E where the attachment Salient Facts and Conclusions concludes that the "Total Compensation Due" from the Utilities Board to EARY is "\$0". As the Board can imagine, EARY, a Class III railroad, cannot make significant portions of its property available for permanent use without compensation. As a result of EARY's demand for compensation and other factors, the Utilities Board sought to condemn two 20-foot wide right-of-ways "on, across, under and over" EARY's line, essentially running perpendicular to the right-of-way and crossing the track at about a 90 degree angle. See the Complaint for Condemnation filed by the Utilities Board on August 23, 2011 in the Probate Court for Talladega County, Alabama, Case No. 2011/197 in Exhibit F.

EARY removed the case to the United States District Court for the Northern District of Alabama, eastern Division in Case No.: 1:11-CV-03192-RBP. By Order dated November 17, 2011, the Court referred the case to the Board "to determine whether the ICCTA preempts the [Utilities Board's] state court condemnation and related issues." (Although omitted, the footnote indicated that the Court was "amenable to the STB's consideration of any issues which the STB is willing to address). See Exhibit G. EARY filed a Petition for Declaratory Order on December 16, 2011 and the Utilities Board replied on January 19, 2012.

The Utilities Board has a contentious history with EARY. The Utilities Board **unilaterally canceled all of the agreements** with EARY that granted the Utilities Board access and easements over the EARY. The reason for such termination was a claim that EARY did not own the property; however, in the Complaint filed in District Court, the Utilities Board admits EARY's ownership of the right-of-way and in the Opposition filed in this proceeding, the Utilities Board's lawyer claimed that the reason for termination was that EARY increased the fee too much. Notwithstanding the foregoing, to date, EARY has refrained from terminating the Utilities Board's use of EARY's property and is seeking to resolve the matter in the Circuit Court of Talladega County, Alabama by a complaint for damages suffered by EARY from the Utilities Board's use of EARY's property. However, the Utilities Board's past actions, which EARY contends are logically a precursor to the Utilities Board's future actions, have been without regard to whether they impede rail service or pose undue safety risks. Following are some incidents where the Utilities Board has acted without the consent of EARY, without notification to EARY, without complying with rail or utility standards accepted and common in the industry, without complying with EARY's operational or engineering standards, without complying with federal regulations (e.g. 49 C.F.R. §214 *et seq.* ("Railroad Workplace Safety Rules")), or without agreement with EARY:

- (1) an incident that occurred in April 2009 when a maintenance-of-way contractor engaged by EARY collided with a line that the Utilities Board was stringing over the railroad tracks without prior notice to EARY and without communicating to EARY so that train crews and other employees would know of the Utilities

Board's activity fouling the track, and without proper flagging as required by the Railroad Workplace Safety Rules would be performed;

(2) an incident in August 2009 when EARY discovered that the Utilities Board had entered the railroad right-of-way without knowledge of EARY to mark the location of utilities on the rail itself from MP 467 to MP 461.5 without communicating to EARY so that train crews and other employees would know of the Utilities Board's activity fouling the track;

(3) an incident in August 2009 when EARY discovered a man who identified himself as an appraiser hired by the Utilities Board walking along the tracks without a right of entry or any personal protective equipment without communicating to EARY so that train crews and other employees would know of the Utilities Board's activity fouling the track;

(4) an incident in October 2009 when EARY discovered unprotected contractors on the track again marking the Utilities Board's utilities without prior notice and without communicating to EARY so that train crews and other employees would know of the Utilities Board's activity fouling the track;

(5) the boring under EARY's track at MP 462.4 and MP 468.8 performed from June 10, 2010 to June 14, 2010 after significant time, money and resources had been expended by EARY to defend threats by the Utilities Board that it was going to enter the right-of-way and perform surface construction work without protection, without compliance with customary engineering standards of

construction and without regard to any interference with railroad operations or potential damage to roadbed, track, equipment and personnel;

(6) an incident in April 2011 when EARY's customer, Heritage Plastics, was told by the Utilities Board that there was an unprotected pipe under the railroad tracks that needed to be corrected without informing EARY of the danger to its roadbed, tracks, equipment and personnel; to this date, EARY does not know whether the unprotected pipe has been repaired so that it is no longer a danger to EARY's roadbed, tracks, equipment and personnel;

(7) an incident in October 2011 when the Utilities Board informed EARY that it had a broken fiber optics line that needed replacement, that such work would be performed without protection and, despite EARY's objection and the lawyer for the Utilities Board informing EARY's lawyer that the Utilities Board would not perform the work but the Utilities Board's employees, an hour later, entered the right-of-way to perform said work before being instructed to vacate the property until certain requirements were met, including compliance with the Railroad Workplace Safety Rules;

(8) the incident in October 2011 when a subgrade pipe owned by the Utilities Board<sup>3</sup> had a water leak that flooded EARY's right-of-way near MP 458.39 such that train operations were suspended until the Utilities Board could locate the water cut-off valve, which had been covered in violation of engineering standards and practices; and

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<sup>3</sup> Ownership of the same pipe had been disclaimed by the Utilities Board in a meeting with EARY's representatives in September 2011.



(9) the incident in November 2011 when EARY discovered employees of the Utilities Board in a boom attached to a vehicle over the right-of-way and the employees denied being on EARY's property because they were "over" said property.

All of these and numerous other events over the last several years have impeded **railroad operations and have been without regard to railroad safety or compliance with** Federal Railroad Administration safety regulations. See, as another blatant example, the letter from counsel for the Utilities Board in Exhibit E explaining that the Utilities Board has no restrictions in its use of the EARY right-of-way. The Utilities Board's past bad acts, combined with the interference that will occur as a result of construction, the lack of **cooperation by the Utilities Board (which has failed even in litigation to inform EARY of** the current condition of the more than 100 facilities currently over and under EARY's property),<sup>4</sup> and the lack of an agreement to protect EARY from the Utilities Board's reckless actions warrant preemption of any attempt by the Utilities Board to use EARY property without an executed agreement between EARY and the Utilities Board.

EARY offers the Board and the Utilities Board a draft License Agreement similar to one entered with the City of Atmore to govern the relationship between EARY and the Utilities Board for the two 20-foot wide easements sought by the Utilities Board in this proceeding. See Exhibit D. EARY is confident that if the Utilities Board was to enter a **License Agreement and abide by its terms, neither the condemnation proceeding nor this** declaratory order proceeding would be necessary. However, the Utilities Board's past

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<sup>4</sup> See the Utilities Board's responses to questions 12 and 13 in the Response attached as Exhibit H.

acts, letter of June 17, 2008, and intransigence in refusing to enter the License Agreement led EARY to the only logical conclusion that if the Utilities Board is allowed to condemn EARY property, the Utilities Board will continue to use the property with total disregard for whether it impedes railroad operations or poses undue safety risks and will undoubtedly claim that it has the right to go "across and over" the active railroad operations.

The License Agreement (Sections 3 and 9) governs the standards for the construction, so that the Utilities Board will not construct substandard pipes under the railroad line, as EARY expects the Utilities Board to since it does not believe it must comply with EARY's engineering requirements and refuses to inform EARY of its maintenance standards or history. Changes to the pipeline would be governed by Sections 4 and 12. Liability would be determined under Section 6. EARY would be indemnified by the Utilities Board for anyone entering EARY's property on behalf of the Utilities Board. As the Utilities Board has claimed it is a non-profit organization, EARY contends that it is also necessary for the Utilities Board to have insurance at levels that protect EARY as provided in Section 8 of the License Agreement. Compliance with FRA rules is provided for in Section 14 and any environmental impacts will be governed by Section 15. Without the License Agreement, the Utilities Board will be free to impede EARY's rail service or pose undue safety risks, as the Utilities Board stated it would do in the June 17, 2008 letter. In addition, the Utilities Board's past actions demonstrate that the Utilities Board does not care whether it impedes rail service or poses undue safety risks, and will continue to do so in the future.

In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), Congress granted the Board exclusive jurisdiction over all rail transportation and rail facilities that are part of the interstate rail network. 49 U.S.C. §10501(b)(1). Section 10501(b) thus shields railroad operations that are subject to the Board's jurisdiction from state or local laws or regulations that would prevent or unreasonably interfere with those operations. See *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) ("*Green Mountain*") and *CSX Transp., Inc.-Pet. for Declaratory Order*, STB Finance Docket No. 34662, (STB served May 3, 2005) ("*CSXT*").

In *CSXT*, the Board noted that there are two broad categories of state and local actions that are preempted regardless of the context or rationale for the action. The first category includes any permitting or preclearance requirements that could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities authorized by the Board. See *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998) and *Green Mountain*. The second category includes any state or local regulation of matters directly regulated by the Board.

If an action does not fall within the above two categories, the section 10501(b) preemption analysis requires the Board to make a fact specific inquiry to determine if the state or local law or regulations as applied would unreasonably burden or interfere with transportation by the rail carrier. See *Borough of Riverdale—Petition for Declaratory Order*, FD 35299, slip op. at 2 (STB served August 5, 2010); *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n.*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996); see also *City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998), *cert. denied*, 527 U.S. 1030

(1999); *Joint Petition for Decl. Order–Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket No. 33971 (STB served May 1, 2001) at 8. “Courts have held that condemnation can be a form of regulation, and that using state eminent domain law to condemn railroad property or facilities that are necessary for railroad transportation ‘is exercising control—the most extreme type of control—over rail transportation as it is defined in [49 U.S.C.] 10102(9).’ See *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp.2d 1009, 1013 (W.D. Wisc. 2000). Therefore, under 49 U.S.C. 10501(b) and relevant precedent, we must consider whether a proposed taking would prevent or unduly interfere with railroad operations and interstate commerce. If the taking would cause such undue interference, then it is federally preempted.” *City of Lincoln–Petition for Declaratory Order*, STB Finance Docket No. 34425 (STB served August 12, 2004) slip op. at 3.

The Board’s broad and exclusive jurisdiction over railroad operations and facilities has been found to prevent application of state laws that would otherwise be available, including condemnation to take rail property for another use that would conflict with the rail use. *Dakota, Minn. & E. R.R. v. State of South Dakota*, 236 F. Supp.2d 989, 1005–08 (S.S.D. 2002), *aff’d on other grounds*, 362 F.3d 512 (8th Cir. 2004) (revisions to state’s eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state “regulation” of railroads); *Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R.*, 265 F. Supp.2d 1005, 1013–14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track).

Whether a condemnation proceeding is preempted is fact specific. Under the current facts, the Utilities Board's condemnation attempt is preempted by 49 U.S.C. §10501(b) because (1) the actual construction will unreasonably conflict with EARY's railroad operations, as admitted by the Utilities Board in the Reply at 2-3; and (2) in the future, EARY reasonably expects the Utilities Board to engage in self-help without regard to property ownership, impeding railroad operations or safety, as the Utilities Board's past actions have demonstrated. But, even without the foregoing, the Utilities Board seeks to condemn a 20-foot wide and 100.59 feet long sewer line "on, across, under and over the land ... and the right to construct and erect on, across, under and over said land," which is the railroad line, and a 20-foot wide and 100.83 feet long water line "on, across, under and over the land ... and the right to construct and erect on, across, under and over said land" the railroad line. Thus, the arguments made by the Utilities Board in its answer are disingenuous because they are not consistent with the allegations in the underlying complaint in federal court. In the present case, because of the language in the Complaint and the Utilities Board's actions to date (which have interfered with EARY's railroad operations) and because the complaint and the pattern of the Utilities Board's actions have had the potential to create serious safety issues, it is reasonable to believe that the Utilities Board's condemnation would also lead to unreasonable interference and pose safety issues with EARY operations.

There are numerous examples of the Utilities Board's interference with EARY's rail operations, which were previously summarized above. It is informative and illustrative to provide a more detailed iteration on a couple of them. On October, 26,

2011, EARY became aware of a Utilities Board water pipe that was leaking. The Utilities Board representative informed EARY that the Utilities Board "did not know [the pipe] was there." After requesting that the leak be stopped, the Utilities Board informed EARY that it could not turn it off because it would impact service to its customers. When EARY said it would exercise self-help to stop the leak in order to prevent a wash-out of its right-of-way, the Utilities Board agreed to stop the water, but then the Utilities Board could not locate the cut-off valve, which it had installed such that an adjacent roadway had covered it. The leak continued until the Utilities Board could find a back-hoe necessary to dig up the roadway surface so that the cut-off valve could be accessed. The leak led to a temporary suspension of operations on the Line in order to allow EARY to engage a contractor to properly inspect the right-of-way for damage before permitting any rail equipment to operate. If the leak had not been stopped, it would have resulted in a wash-out of the railroad right-of-way. This is just one example of interference with rail operations by a subsurface pipe that was not properly maintained by the Utilities Board.

In April, 2009, a Utilities Board employee or contractor entered EARY property without informing EARY and strung a cable across the right-of-way. An EARY Hi-rail vehicle involved in normal railroad operations struck the wire before the vehicle could be stopped. This could have led to a serious injury to either railroad employees or the contractors on the ground.

Without an agreement in place to govern what happens and who is responsible for damages when the Utilities Board's facilities on EARY's property outlive their useful

life, break, or are damaged, there is nothing to require that the Utilities Board refrain from interfering with EARY's railroad operations, short of an injunction from the Board or a court of competent jurisdiction.

As shown above, the Utilities Board has an abysmal track record of communicating with EARY or providing preventive maintenance on some of its facilities. This evidences a total lack of disregard by the Utilities Board for EARY's property rights and EARY's ability to operate safely. There is a high probability that the sewer line will leak and with no agreement in place to deal with such an issue, EARY's railroad operations could be disrupted for days at a time. If the leak is not caught quickly and dealt with, the right-of-way could washout, leaving EARY to shoulder the substantial cost of repairing the line.

Without a voice in what construction standards are to be used, including the depth of the pipe, and without knowing what the Utilities Board's maintenance and replacement standards are for this sewer line, EARY cannot adequately protect itself or its customers from an interruption of railroad operations.

Construction of the sewer line will interfere with EARY's railroad operations. **Any construction within a railroad right-of-way will cause interference with railroad operations and potentially significant safety issues.** While this interference is usually temporary, it can still be significant if the party performing the construction does not communicate with the railroad and there is no compliance with the Railroad Workplace Safety Rules. In the case of the Utilities Board, it has failed to communicate with EARY

about entering EARY property multiple times. This failure on the Utilities Board's part could have caused significant injury to Utilities Board contractors and EARY employees.

Construction of the pipeline requires slow moving equipment near or on the railroad until the pipe installation is complete. The Utilities Board must be required to communicate with EARY to prevent any type of collision during construction. If the Utilities Board's contractors do not place the pipe correctly, it will damage the subgrade which will cause safety issues and disrupt railroad operations. Without being required to inform and seek input from EARY on the timeframe of its construction plans, EARY will not be able to plan around the construction thereby creating the least disruption to its operations.

EARY wants to reiterate to the Board and to the Utilities Board that it wishes to resolve this matter consistent with common industry practice, but EARY must look out for the safety of its employees and believes that it must take reasonable steps to avoid interference with its operations, which is the transportation of goods in commerce on its single rail line. Without justification, the Utilities Board terminated all of its agreements with the EARY. Thus, there are no agreements for over 100 facilities that cross the EARY's right-of-way. Forty percent of these facilities were constructed without the EARY's permission and without agreements. The date of installation is unknown and, thus, EARY has no information to use to assess whether there will be more interference in the near future.

Based on the history of the Utilities Board's dealing with EARY it is clear that the condemnation will result in interference with railroad operations during facility



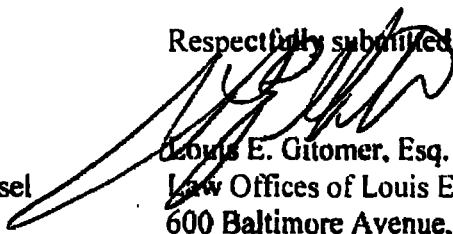
construction and future maintenance, repair and replacement. Thus, it should be preempted.

### **CONCLUSION**

EARY asks that the Board find that the Utilities Board's condemnation of a pipe based on the allegations in the Utilities Board's Complaint is preempted and that the Board has jurisdiction to require the Utilities Board to negotiate with EARY and to enter an agreement similar to the License Agreement in order to prevent the Utilities Board from impeding rail service or posing undue safety risks during construction and for the life of the pipeline.

Scott G. Williams Esq.  
Senior Vice President & General Counsel  
RailAmerica, Inc.  
7411 Fullerton Street, Suite 300  
Jacksonville, FL 32256  
(904) 538-6329

Respectfully submitted,



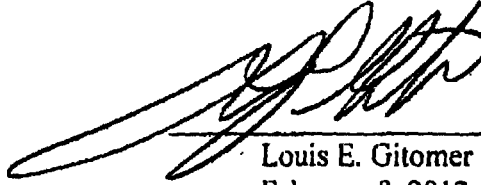
Louis E. Gitomer, Esq.  
Law Offices of Louis E. Gitomer  
600 Baltimore Avenue, Suite 301  
Towson, MD 21204  
(410) 296-2250  
Lou@lgraillaw.com

Attorneys for: EASTERN  
ALABAMA RAILWAY LLC

Dated: February 8, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing document to be served upon counsel for Utilities Board of the City of Sylacauga electronically and by pre-paid first class mail.



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Louis E. Gitomer  
February 8, 2012

## **EXHIBIT A-UNDERGROUND PIPELINE APPLICATION**

To be completed by Real Estate Manager

Contract Number

RR Code

Lessee Code

Engineer Approval

Date Approved



## RailAmerica

Real Estate Department, 7411 Fullerton Street - Suite 110, Jacksonville, FL 32256

### APPLICATION FOR UNDERGROUND PIPELINE CROSSING OR PARALLELISM OF RAILROAD PROPERTY AND OR TRACK

*Incomplete or Inaccurate Information will delay application request*

#### Section 1 - Applicant Data

##### Facility Owner

Complete Name of Applicant to  
appear on Legal Document:

Applicant Mailing Address:

Applicant overnight Address:

Applicant Billing Address:

Applicant FEIN or  
Social Security  
Number:

Telephone  
Number:

Applicant  
Contact Name  
& Title:

Fax Number:

Email Address:

Emergency Contact:

Emergency Telephone Number:

Applicant:

☐ Corporation

☐ Partnership

☐ Sole Proprietor

☐ Individual

☐ Municipality

☐ Developer

☐ Other

If other please explain:

State of Incorporation or  
Partnership:

**Contact during Application Process:**

Name: \_\_\_\_\_  
Telephone Number: \_\_\_\_\_ Fax Number: \_\_\_\_\_  
Email Address: \_\_\_\_\_

**Section 2 - Location Data**

Proposed date of Installation \_\_\_\_\_  
Railroad Name: \_\_\_\_\_  
Nearest City: \_\_\_\_\_ County: \_\_\_\_\_ State: \_\_\_\_\_  
If Crossing Nearest Railroad Mile Post (required): \_\_\_\_\_ Feet from Railroad Milepost \_\_\_\_\_ N S E W  
Latitude/Longitude: \_\_\_\_\_  
Valuation Station: \_\_\_\_\_  
Quarter, Section, Township & Range: \_\_\_\_\_  
Railroad Subdivision (required): \_\_\_\_\_ US DOT/AAR Crossing Number: \_\_\_\_\_  
Is Crossing within a Public Road Right-of-Way? ☐ Yes\* ☐ No. If YES, Name of Street: \_\_\_\_\_

\*If yes , road name, number and width of public right-of-way are required on drawing, incomplete information will delay the application process.

**Section 3 - Pipeline Data**

Crossing or Parallelism? ☐ Crossing ☐ Parallelism  
If Crossing complete sections 3 and 4  
If Parallelism complete sections 3, 4 and 5  
Installation. ☐ New ☐ Maintenance \* ☐ Upgrade \*\* ☐ Replacement \*\* ☐ Other  
\*\*If revision or maintenance to existing crossing provide agreement number (Required): \_\_\_\_\_ Proposed Date of Installation \_\_\_\_\_  
If Other or revision to existing facility please explain: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Product to be Conveyed: ☐ Water ☐ Sewer ☐ Oil ☐ Gas ☐ Storm Drain

Type of Service: (Choose one) ☐ Transmission ☐ Distribution ☐ Service ☐ Other

Angle of Pipe Line Crossing the Track: \_\_\_\_\_ Degrees \_\_\_\_\_

Will facility be exclusively used by Applicant? ☐ Yes ☐ No\*\*\*

\*\*\*If no, list all entities who will be using this facility: \_\_\_\_\_

### Pipeline Specifications

	Carrier Pipe	Casing Pipe
Material	_____	_____
Material Specifications and Grade	_____	_____
Minimum Yield Strength of material (PSI)	_____	_____
Mill Test Pressure	_____	_____
Inside Diameter	_____	_____
Outside Diameter	_____	_____
Wall Thickness	_____	_____
Type of Seam	_____	_____
Laying Lengths	_____	_____
Type of Joints	_____	_____

Vents: \_\_\_\_\_ Number: \_\_\_\_\_ Size: \_\_\_\_\_

Seals: Both Ends: ☐ Yes ☐ No One End: ☐ Yes ☐ No

\*\*Cathode Protection: ☐ Yes ☐ No \*\*Protective Coating: ☐ Yes ☐ No

\*\* Kind \_\_\_\_\_

Type, size, and spacing of insulators or supports: \_\_\_\_\_

Location of Shut-Off Valves: \_\_\_\_\_ Number of Manholes: \_\_\_\_\_

Describe in detail the manner and method of installation on Railroad Property: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Number of Tracks  
Crossed: \_\_\_\_\_

Total Buried Length on Railroad  
Right of Way: \_\_\_\_\_

Bury: Bottom of  
Tie to Top of  
Casing: \_\_\_\_\_ Feet and Inches: \_\_\_\_\_

Location of Boring Pits adjacent to Track: \_\_\_\_\_ feet \_\_\_\_\_

Launching Pit: \_\_\_\_\_ feet      Receiving Pit: \_\_\_\_\_ feet

**Section 5 - Parallelism Data**

Total Buried Length on Railroad  
Right of Way: \_\_\_\_\_

Location if Parallelism Crosses  
Tracks: \_\_\_\_\_

**Begin Parallelism**  
**Railroad Milepost:** \_\_\_\_\_ **Feet from Railroad Milepost** \_\_\_\_\_ **N S E W**

**End of Parallelism**  
**Railroad Milepost:** \_\_\_\_\_ **Feet from Railroad Milepost** \_\_\_\_\_ **N S E W**

Describe in Detail the manner and method of installation on Railroad Property: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

## Plans for proposed installation shall be submitted to and approved by the Railroad and designated engineer before work can begin!

Upon application approval, applicant agrees to reimburse Railroad for any cost incurred by Railroad incident to the installation, maintenance and/or supervision necessitated by the installation. Applicant further agrees to assume all liability for accidents or injuries that arise as a result of this installation.

Material and installation are to be in strict accordance with specifications of National Electrical Safety Code and AREMA, current edition, and requirements of the Railroad.

Prior to submission, it is recommended that any questions concerning this application should be submitted to the Real Estate Department of RailAmerica, Inc. All questions or requests for information submitted by email receive a rapid response. Other requests can be made by phone (904) 538-6365, or fax (904) 256-1428. Additional information can also be obtained at our website: [www.railamerica.com](http://www.railamerica.com).

**Standard Application processing takes approximately 4-8 weeks. "Expedited processing" is available and will reduce the processing time to between 1-2 weeks at an additional cost of \$1,750.**

Mail the application for proposed facility in triplicate, along with a **\$1,000 Application Fee**, **\$1,500 Engineering Review Fee**, and a **\$1,500 Contractors Access/Occupancy Application Fee** (all fees are non-refundable) in U.S. Funds to:

RailAmerica, Inc.  
Attn: Real Estate Department  
7411 Fullerton Street - Suite 110  
Jacksonville, FL 32256

**Make Check payable to the Railroad in question. W-9 Information available upon request.**

**This section must be completed in full signed and dated when submitting to the Real Estate Department for processing, Incomplete or Inaccurate Information will delay application request**  
**Unsigned applications will be returned to applicant for signature and submission date.**

Date: \_\_\_\_\_ Signature: \_\_\_\_\_

Phone Number: \_\_\_\_\_ Printed Name: \_\_\_\_\_

Fax Number: \_\_\_\_\_ Title: \_\_\_\_\_

Contact Email Address: \_\_\_\_\_

**If installing more than one facility in the same location, a separate application MUST be completed for each new line to be installed. Applications submitted with more than one facility listed will be returned and will not be processed until all applications are returned accurate, complete and with all applicable fees.**

### **IMPORTANT!**

In order for the application to be complete ALL details pertinent to the proposed installation must be completed in full and submitted along with the following documents:

	# of Copies	Amount Due	Description
<input type="checkbox"/>	2	\$1,000	Completed Wire line Application and processing fee
<input type="checkbox"/>	2	\$1,500	Engineer review fee, plans/drawings, no larger than 11 x 17. Larger drawings will incur additional engineering fees.
<input type="checkbox"/>	2	\$1,500	Completed Contractor's Access/Occupancy Application and Fee
		<b>\$4,000</b>	

**Standard Application processing takes approximately 4-8 weeks. "Expedited processing" is available and will reduce the processing time to between 1-2 weeks at an additional cost of \$1,750.**

**Entering or working on the railroad right of way or any other railroad property without the permission of the railroad is trespassing and illegal. Violators risk the possibility of serious, even fatal, injury and will be prosecuted.**



## **EXHIBIT B-RIGHT OF ENTRY AND ACCESSING PROPERTY**

**Any entry or construction activities on railroad right of way must be authorized by the railroad in writing. Written authorization is obtained through a Right of Entry Permit or Contractor Occupancy/Access Agreement (See the following page).**

**The applicant must submit the completed application to the Real Estate Department including a check or money order, to cover the non-refundable fee of \$1,500. The application must include railroad milepost, railroad subdivision, and scope of work. If any of these items on the application are incomplete, the application will be immediately rejected.**

**The standard term for a Right of Entry Permit or Contractor Occupancy/Access Agreement is sixty (60) days. Longer terms are reviewed on a case by case basis and may be assessed additional fees.**

**Upon approval of the application, the Real Estate Department will draft an agreement and forward to the applicant for signature. Application does not guarantee approval. The applicant must then return the signed document to the Real Estate Department along with the pertinent certificate of insurance outlined in the agreement. Once in receipt of these documents, the railroad will then execute the agreement.**

**For "standard processing", the entire process takes between 4-8 weeks. "Expedited processing" will reduce the processing time to between 1-2 weeks and costs an additional \$1,750.**

This section to be completed by  
RailAmerica Real Estate Dept.

Contract Number \_\_\_\_\_

RR Code \_\_\_\_\_

Date App  
Packet  
Received \_\_\_\_\_  
Regional  
Manager  
Approval \_\_\_\_\_

Lessee Code \_\_\_\_\_

Engineering  
Approval \_\_\_\_\_

GIS Prefix \_\_\_\_\_

Date Approved \_\_\_\_\_

Date Approved \_\_\_\_\_



# RailAmerica

Real Estate Department, 7411 Fullerton Street, Suite 300, Jacksonville, FL 32256

## APPLICATION FOR CONTRACTOR OCCUPANCY ON RAILROAD PROPERTY

☐ **Check box if Contractor unknown at this time**  
*Incomplete or Inaccurate Information will delay application request*

### Section 1 - Applicant Data

#### Facility Owner

Complete Name of Applicant to  
appear on Legal Document:

Street Address \_\_\_\_\_

City, State, Zip Code \_\_\_\_\_

Name of Contact \_\_\_\_\_

Telephone  
Number  
(Required):

Fax  
Number  
(Required):

Email Address  
(Required):

\_\_\_\_\_

## Section 2 - Location Data

Proposed date of Installation: \_\_\_\_\_

Railroad Name: \_\_\_\_\_

Nearest City: \_\_\_\_\_ County: \_\_\_\_\_ State: \_\_\_\_\_

If Crossing Nearest Railroad  
Mile Post (required):

\_\_\_\_\_ Feet from Railroad Milepost \_\_\_\_\_ N S E W

Latitude/Longitude  
(Required in Digital Format):

\_\_\_\_\_

Railroad Subdivision  
(Required):

US  
DOT/AAR  
Crossing  
Number  
(Required): \_\_\_\_\_

## Section 3 - Existing Agreement Data

Is there an Existing Agreement at this Location which will be affected by this Request?

☐ Yes

☐ No

If YES, List Agreement Number(s): \_\_\_\_\_

Will Line Exclusively Serve Lessee of Railroad? ☐ Yes ☐ No

If YES, List Name of Lessee: \_\_\_\_\_

Describe in detail the manner and method of installation on Railroad property:

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#### Section 4 - Federal, State, or Local Transportation Project (DOT Project)

Is this installation associated with a DOT project? ☐ Yes ☐ No

If Yes, complete the following:

DOT Contract Number: \_\_\_\_\_ DOT Project Number: \_\_\_\_\_

DOT Project Name: \_\_\_\_\_

DOT Contact Information:

Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

#### **IMPORTANT!**

Prior to submission, it is recommended that any questions concerning this application should be submitted to the Real Estate Department of RailAmerica, Inc. All questions or request for information submitted by email receive a timely response. Other requests can be made by phone (904) 538-6365, fax (904) 256-1428, or email [donna.killingsworth@railamerica.com](mailto:donna.killingsworth@railamerica.com). Questions can be answered and additional contact information obtained by visiting our website at [www.railamerica.com](http://www.railamerica.com)

In order for the application to be complete ALL required details pertinent to the proposed installation must be completed in full and submitted along with the following documentation and applicable fees:

# of Copies	Amount Due	Description
2	\$1,500	Engineer review fee, plans/drawings, no larger than 11 x 17, applicable to projects that will require fouling of railroad right of way or tracks. Larger drawings may incur additional engineering fees.
2	\$1,500	Completed Contractor's Access/Occupancy Application and Fee required with ALL application submittals.
	<hr/> \$3,000	<b>All applicable fees must be submitted with application. Applications submitted not signed, dated and with proper fees will be returned.</b>

Standard Application processing takes approximately 6-8 weeks. "Expedited processing" is available and will reduce the processing time to between 1-2 weeks at an additional cost of \$1,750.

**Entering or working on the railroad right of way or any other railroad property without the permission of the railroad is trespassing and illegal. Violators risk the possibility of serious, even fatal injury and will be prosecuted.**

**EXHIBIT D – MASTER LICENSE AGREEMENT**

**MASTER LICENSE AGREEMENT**

This Master License Agreement (hereinafter "Agreement") made this 1<sup>st</sup> day of May, 2009 (hereinafter "Effective Date") by and between [REDACTED], its successors, assigns or affiliated companies (hereinafter "LICENSOR"), whose address is [REDACTED], and [REDACTED] (hereinafter "LICENSEE"), whose address is [REDACTED].

WHEREAS, LICENSOR owns certain real estate and other property on, over or under which LICENSEE has either installed or maintained facilities, appliances or fixtures necessary for its business; and

WHEREAS, LICENSOR and LICENSEE have entered into agreements previously for some of the facilities, appliances or fixtures, and the parties desire to enter into one blanket agreement for all existing facilities, appliances or fixtures.

NOW THEREFORE, for valuable consideration as outlined herein, the receipt of which is hereby acknowledged, the parties agree:

1. **LOCATION.** LICENSOR hereby conveys to LICENSEE the non-exclusive right and privilege to enter onto property either owned or controlled by LICENSOR to construct, install and/or maintain certain appliances or fixtures, as described herein, as indicated on Attachment A attached hereto and made a part hereof (hereinafter "Occupancies"). LICENSOR further grants LICENSEE the right to continue to operate such Occupancies upon, along or across LICENSOR's property. The Occupancies include all necessary appurtenances and other related fixtures, equipment, marker posts or electric power which are in, under, upon, over or across LICENSOR's property located at or near the Occupancies.

2. **DESCRIPTION, PURPOSE AND RENT.** Said license for the Occupancies is granted contingent upon payment to LICENSOR of annual fees, as outlined on Attachment A, with an Effective Date of May 1, 2009, for each of the occupancies, to offset the additional expense incurred by the LICENSOR for administration costs of maintaining records for facilities occupying LICENSOR'S properties as well as the increased cost of inspection required to identify any additional risk to the LICENSOR prior to completing track maintenance such as grading and replacement of ties and rails. The total annual fees plus any applicable taxes are due and payable upon execution of this agreement and no later than the anniversary date of each calendar year with an annual increase of no less than three (3) percent each successive year thereafter commencing on the anniversary date for the year 2010. The annual fee provided for herein shall be subject to further review every five (5) years. LICENSEE shall also submit one-time processing, engineering observation, and right of entry fees for any new occupancy that the LICENSEE adds to Attachment A after the effective date. Attachment A will be adjusted via amendment to reflect the addition or removal of occupancies. Billing or acceptance by LICENSOR of any annual fee shall not imply a definite term or otherwise restrict either party from canceling this Agreement as herein provided.

3. **PLANS AND DRAWINGS.** If required by LICENSOR, LICENSEE at its sole cost and expense, shall, upon completion of the construction and installation of the Occupancies, furnish LICENSOR with a survey drawing, showing the final exact location of each of the Occupancies as constructed. The survey drawing shall indicate LICENSOR'S survey valuation station which said installation is located, and/or the position of each of the Occupancies in relation to the center line of the track and/or the centerline of the

closest public street crossing said track(s). Said survey drawing to be attached to this Agreement as Licensee's Exhibits to Attachment A and made a part hereof. It is further mutually understood and agreed by and between the parties hereto that all sub grade crossing installations shall be marked by the erection of a suitable monument located on each side of the LICENSOR'S right of way. Additional drawings shall be attached as Exhibits and made a part hereof.

4. ALTERATION. In the event that the use of any of the Occupancies as set forth above is (1) materially changed, (2) discontinued, (3) abandoned or (3) removed (in whole or in part), this Agreement shall automatically terminate with regards to the extent of the affected Occupancies. In the event LICENSEE shall at any time desire to make changes in the physical or operational characteristics of any of the Occupancies or enter LICENSOR's property for any reason whatsoever, LICENSEE shall first secure in writing, the consent and approval of LICENSOR. All renewals, changes or additional construction after the Occupancies have initially been constructed, shall be authorized only after review and approval by LICENSOR as initially required in Paragraph 9. LICENSEE agrees that such changes shall be made at LICENSEE's sole risk, cost and expense and subject to all the terms, covenants conditions and limitation of this Agreement. Licensee agrees that if, by reason of any changes or additions made at any time by Licensor in its tracks, right of way, structures and appliances thereon, or property, it becomes necessary to change the location of all or any part of any Occupancy or Occupancies of the Licensee, such changes as are necessary shall be made by Licensee promptly at the request of the Licensor and at the sole cost and expense of Licensee.

5. NOTICE. Any notice to be given or to be served upon any party hereunder, in connection with this Agreement must be in writing and must be given by certified or registered mail and shall be deemed to have been give and received when a certified or registered letter, containing such notice, properly addressed, with postage prepaid, is deposited in the mail; or, if given otherwise than by certified or registered mail, it shall be deemed to have been given when delivered to and received by the party to whom it is addressed. Such notices shall be addressed to the parties herein at the following addresses:

TO LICENSOR: Real Estate & Administration, AVP  
c/o RailAmerica, Inc.  
7411 Fullerton Street  
Suite 110  
Jacksonville, FL 32256

WITH COPIES TO: [REDACTED]

TO LICENSEE: [REDACTED]

6. LIABILITY. LICENSEE waives and relinquishes any legal rights and monetary claims which it might have for full compensation, or damages of any sort, including but not limited to special damages; severance damages, removal costs or loss of business profits resulting from its loss of occupancy of the LICENSOR'S property specified in this Agreement whether such property is taken by eminent domain proceedings or sold under the threat thereof.

7. INDEMNITY.

(a) ALL PERSONS ENTERING UPON THE LICENSOR'S PROPERTY, SHALL ASSUME ALL RISKS OF AND LICENSOR SHALL NOT BE LIABLE FOR ANY INJURY (INCLUDING INJURY RESULTING IN DEATH), LOSS, DAMAGES OR EXPENSE TO SUCH PERSON OR HIS/HER PROPERTY WHILE ON THE LICENSOR'S PROPERTY, UNLESS CAUSED BY THE GROSS NEGLIGENCE OR ACTS OF WILLFUL MISCONDUCT OF THE LICENSOR, ITS SERVANTS, AGENTS OR EMPLOYEES OR OTHER PERSONS FOR WHOM LICENSOR IS IN LAW RESPONSIBLE.

(b) THE PARTIES ACKNOWLEDGE THAT THE USE OF LICENSOR'S PREMISES IS FOR THE SOLE CONVENIENCE OF LICENSEE AND THAT LICENSOR SHALL HAVE NO DUTY TO LICENSEE, ITS OFFICERS, EMPLOYEES, AGENTS OR CONTRACTORS TO PROVIDE A REASONABLY SAFE PLACE IN WHICH TO WORK, TO PROVIDE ADEQUATE OR SAFE METHODS AND EQUIPMENT FOR THEIR WORK OR TO INSPECT OR MAINTAIN THE OCCUPANCIES FOR SAID SAFE METHODS AND WORK EQUIPMENT NOR TO GIVE ANY WARNINGS OR OTHER NOTICES TO LICENSEE'S EMPLOYEES OR INVITEES REGARDING SAFETY EITHER OF THE OCCUPANCIES AND RELATED WORKPLACE OR LICENSOR'S PROXIMATE RAILROAD OPERATIONS AND THAT ALL SUCH DUTIES SHALL BE ASSUMED BY LICENSEE WHO FURTHER AGREES TO DEFEND AND HOLD HARMLESS LICENSOR FROM ANY AND ALL CLAIMS ALLEGING ANY FAILURE TO PERFORM SAID DUTIES.

8. INSURANCE. LICENSEE shall name LICENSOR and RAILAMERICA, INC., their subsidiaries and respective officers, directors and employees, as additional insured for all risks (including, if applicable, fire and explosion due to the Occupancies, in an amount not less than Two Million Dollars (\$2,000,000) per occurrence, Six Million Dollars (\$6,000,000.00) aggregate liability and, prior to any construction project, a policy of Railroad Protective Liability Insurance in amount of Two Million Dollars (\$2,000,000.00) per occurrence, Six Million Dollars (\$6,000,000.00) aggregate. Each policy shall be endorsed to provide a minimum of 10 days advance notice of cancellation to said additional insured and include a waiver of subrogation. LICENSEE shall furnish a certified policy of insurance prior to the construction period. Said coverage shall remain in force for the duration of this Agreement. Provided, however, LICENSOR may require increases in liability coverage to equal or exceed LICENSOR'S own level of liability coverage, having regard for the circumstances. LICENSOR shall further have the right to approve the Carrier furnishing such coverage. Evidence satisfactory to LICENSOR'S Department of Insurance and Risk Management of LICENSEE'S authorized self-insurance program capable of providing for such limits, will be accepted in lieu of a policy from a commercial carrier. This clause shall not serve in any way to limit LICENSEE'S liability to the amounts of insurance required.

9. DESIGN AND MATERIAL STANDARDS. All work for installation, construction, use, repair and maintenance of the Occupancies shall be of the usual strength and fitness for the purpose intended and be done in good and workman-like manner by the LICENSEE at its sole cost and expense and in a manner



satisfactory to the LICENSOR. Within thirty (30) days after completion of construction or installation, LICENSEE shall submit to LICENSOR a complete and detailed set of "as-built" plan and profile drawings and further, shall certify to LICENSOR in writing that fixture has been installed in substantial conformance to the plan attached to the application. Each of the Occupancies shall be installed to the satisfaction and approval of LICENSOR's Engineer and all costs of LICENSOR's Engineer and other technicians or professional consultants as may be required from time to time shall be borne by LICENSEE.

**10. DURATION.** This Agreement shall commence on the Effective Date and continue until terminated as provided herein or by operation of law. Notwithstanding the term of this Agreement and the advance payment of rental therefore, either party may terminate this agreement as to any of the Occupancies, at any time after the other party has breached any of its obligations hereunder, upon giving the other party thirty (30) days' notice in writing of its desire to terminate this agreement, and indicating in said notice which of the Occupancies to which such termination shall apply. When this Agreement shall be terminated as to the Occupancies, or as to any part thereof, LICENSEE within thirty (30) days' after the expiration of the time stated in said termination notice, agrees at LICENSEE'S own risk and expense to remove the Occupancies from the property of LICENSOR, or such portion thereof as LICENSOR shall require removed, and to restore LICENSOR'S premises and property to a neat and safe condition, and if LICENSEE shall fail to do so within said time, LICENSOR shall have the right, but not the duty, to remove and restore the same, at the risk and expense of LICENSEE. Said restoration shall include, but not be limited to, any and all harm, damage or injury done to LICENSOR'S property and/or to any other public or private property by acts or occurrences subject to Federal, State or local environmental enforcement or regulatory jurisdiction, and shall include necessary and appropriate testing and cleanup. Nothing herein contained shall be construed as conferring any property right on LICENSEE.

**11. LEGAL COMPLIANCE.** Notwithstanding any requirement that LICENSOR approve the designs for construction of any facility, LICENSEE shall have the sole responsibility to ensure that all construction, installation (including the manner thereof) and maintenance of any Occupancy comply with all applicable federal, provincial and local law and regulation. LICENSEE shall obtain any permits, license or franchises required by law.

**12. REMOVAL.** Upon termination of this Agreement and the Occupancies, or any of the Occupancies, for any reason, after all structures and alterations shall be removed from LICENSOR's property, said property shall be returned to a physically and environmentally whole condition to the satisfaction of LICENSOR'S designated Environmental Officer or Representative, all at the sole cost and expense of LICENSEE. LICENSOR may, at LICENSOR's sole discretion, during the removal of any of the Occupancies, require LICENSEE to conduct an environmental appraisal and report of the property formerly occupied by any of the Occupancies. All reports shall be prepared by a LICENSOR approved environmental consultant, to determine if LICENSOR's property has been environmentally impacted by any of the Occupancies. All environmental reports, which are prepared subject to this clause, shall be immediately available to LICENSOR by LICENSEE. This clause shall survive termination of this Agreement.

13. COSTS AND EXPENSES OF THE OCCUPANCIES. LICENSEE shall bear the sole cost and expense of installation, construction, maintenance and removal of the Occupancies and any and all facilities and appurtenances related thereto, including any permits, licenses franchises, or any governmental approval and taxes thereon.

14. SAFETY. Any entry by LICENSEE, its agents or representatives that require inspection or work near or adjacent to any tracks shall require a representative of LICENSOR to be present to ensure that LICENSOR's railroad operations is aware of LICENSEE's activities on LICENSOR's property. Such "flagging" services shall be at LICENSEE's sole expense.

15. ENVIRONMENTAL IMPACT. Beginning on the Effective Date, and throughout the term of the Agreement LICENSEE shall:

- (a) expeditiously cure at its own expense to the reasonable satisfaction of LICENSOR any material violation of applicable environmental laws caused by Occupancy to the extent such violation is attributable to events or conditions which arose on or after the Effective Date;
- (b) within ten (10) business days notify LICENSOR in writing of and provide reasonably requested documents upon learning of any of the following which arise in connection with the Occupancy: any liability for response or corrective action, natural resource damage, or other harm caused by any violation of applicable environmental law or release, threatened release, or disposal of a dangerous substance;
- (c) conduct expeditiously at its expense to the reasonable satisfaction of LICENSOR and in accordance with any applicable environmental law response action necessary to remove, remediate, clean up, or abate any significant release, on or after the Effective Date; upon written request of LICENSOR, timely provide at LICENSEE's expense a report of any environmental assessment of reasonable scope, form, and depth (including, where appropriate, invasive soil or groundwater sampling) by a consultant reasonably approved by LICENSEE as to (1) any matter to the extent such matter arises during the Lease term and for which notice is provided pursuant to the above requirements; and (2) the general environmental condition of the relevant Occupancy within three hundred and sixty-five (365) days of the termination date. If such a requested environmental report is not delivered within seventy-five (75) days after receipt of LICENSOR's request, then LICENSOR may arrange for same. The reasonable cost of any assessment arranged for by LICENSOR pursuant to this provisions shall be payable by LICENSEE on demand.

16. GOVERNING LAW. This Agreement shall be construed and enforced in accordance with the laws of the state where the Occupancies are located. If the laws of more than one state apply, then this Agreement shall be construed and enforced in accordance with the laws of the State of Alabama.

17. ASSIGNABILITY. The LICENSEE shall NOT assign, transfer or dispose of this Agreement or of the rights and privileges conferred thereby without the consent in writing, first obtained, of LICENSOR, which consent shall not be unreasonably withheld. Without prejudice to the foregoing, this agreement shall be binding upon and inure to the benefit of each party hereto any or any subsequent successors and assigns.

18. WAIVER. The failure of LICENSOR to enforce any term or condition herein shall not be deemed as a waiver of its rights to subsequently enforce such term or condition. Nor shall a valid waiver of LICENSEE'S breach of any term or condition be deemed a waiver of any subsequent breach by LICENSEE.

19. **ILLEGALITY.** If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

20. **SUPERSEDES.** Execution of this Agreement shall supersede as of the Effective Date any and all previous agreements, if any, related to the Occupancies and use herein described, which may exist between the parties or their predecessors.

THIS AGREEMENT IS hereby declared to be binding upon the parties hereto.

IN WITNESS WHEREOF, the undersigned have hereunto set their hand and seals this \_\_\_\_\_ day  
of \_\_\_\_\_ 2009.

**WITNESS**

\_\_\_\_\_

**LICENSOR**

[REDACTED]

By (Print Name): \_\_\_\_\_

Title: \_\_\_\_\_

Signed: \_\_\_\_\_

**WITNESS**

\_\_\_\_\_

**LICENSEE**

[REDACTED]

By (Print Name): \_\_\_\_\_

Title: \_\_\_\_\_

Signed: \_\_\_\_\_

			Attachment A			
Contract	Sub Division	State	Type	Station	Description	Annual Fee

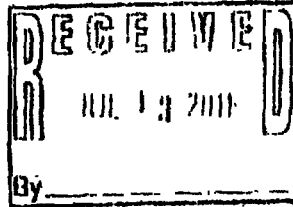
**EXHIBIT E-JULY 8, 2011 BURKHOLDER LETTER**



BALCH & BINGHAM LLP

Alabama • Georgia • Mississippi • Washington, DC

David Burkholder  
(205) 226-3403



Attorneys and Counselors  
1901 Sixth Avenue North, Suite 1500  
P.O. Box 306 (35201-0306)  
Birmingham, Alabama 35203-4642  
(205) 251-8100  
(205) 226-8799 Fax  
www.balch.com

(205) 488-5719 (direct fax)  
d Burkholder@balch.com

July 8, 2011

BY U.S. MAIL

Mr. Kenneth Charron  
VP and Commercial Counsel  
RailAmerica, Inc.  
7411 Fullerton Street  
Jacksonville, Florida 32256

Mr. John F. DeBuys, Jr.  
Mr. Turner B. Williams  
Burr Forman LLP  
420 North 20th Street  
Suite 3400  
Birmingham, Alabama 35203

**Re: Acquisition of Easement for Underground Utility by the Utilities Board of  
the City of Sylacauga from Eastern Alabama Railway, LLC**

Dear Messrs Charron, DeBuys, and Williams:

The Utilities Board of the City of Sylacauga is in need of a new easement for an underground sewage line crossing Eastern Alabama Railway's corridor in the area of Hill Road. A survey is attached highlighting the proposed easement. Inasmuch as this easement has not been acquired through negotiations, and condemnation of such rights must be initiated in probate court, I am submitting on behalf the Utilities Board the enclosed written statement and summary of its approved appraisal showing the basis for the amount established as just compensation for the property in connection with this acquisition.

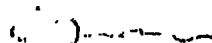
The Board retained the services of a qualified appraiser to appraise the property involved in the subject crossing by the Board's underground utility line in the "before" and "after" situation, with the difference being just compensation. The appraiser has determined that the difference between before and after value of the Railway's property is "zero" dollars. While § 18-1A-22, CODE OF ALABAMA requires the condemning authority to establish an amount based on an appraisal it believes to be just compensation and promptly submit to the owner an offer to acquire the interest in the property for the full amount established in the appraisal, which in this case is "zero" dollars, please be advised that the Board is willing to pay a one-time consideration of \$500 for the easement rights. If you accept this offer, I will forward appropriate easement instruments for execution by Eastern Alabama Railway, LLC.

Thank you for your attention and consideration.

BALCH & BINGHAM LLP

Mr. John F. DeBuys, Jr.  
Mr. Turner B. Williams  
July 8, 2011  
Page 2

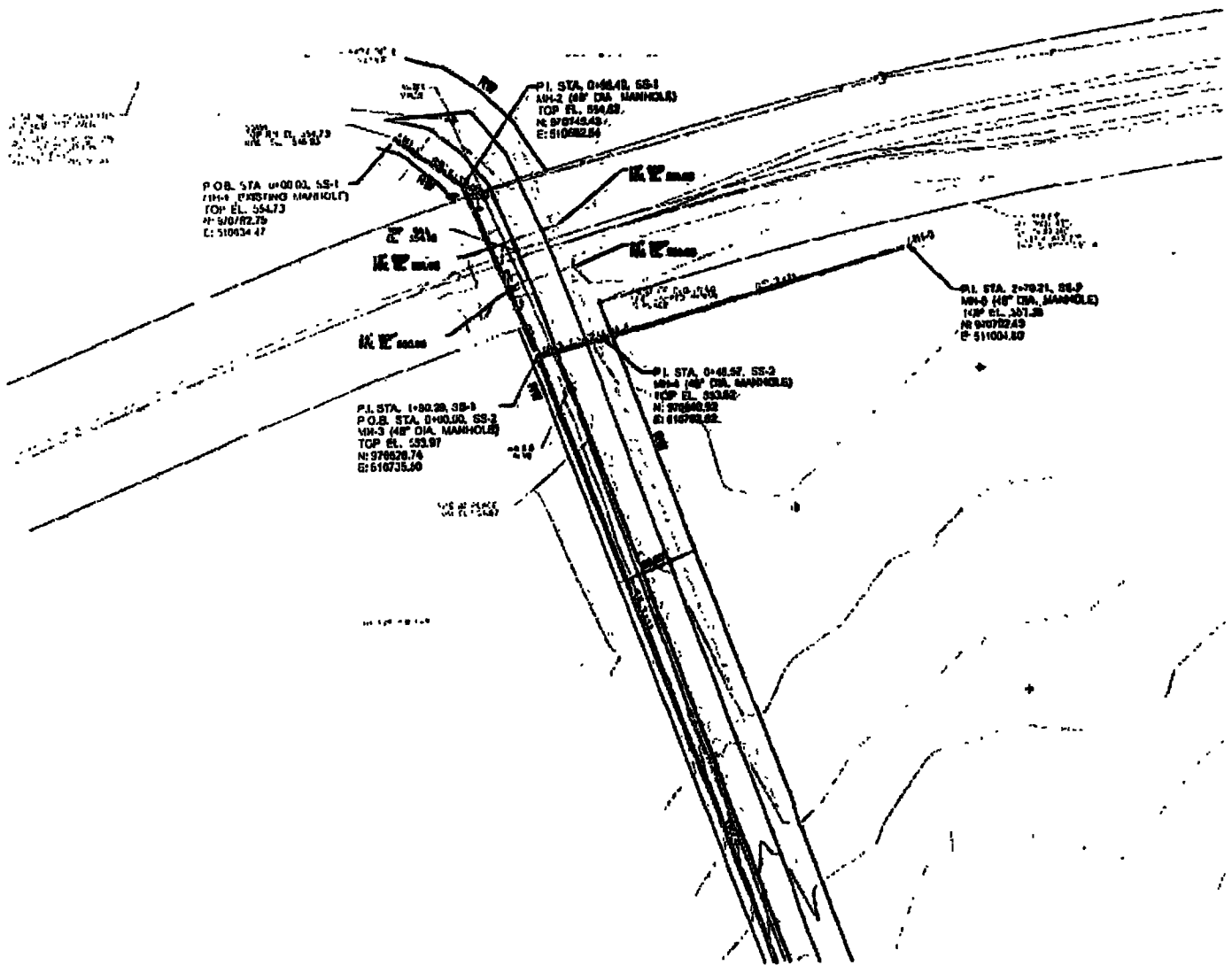
Very truly yours,



David Burkholder

DB:sl

cc: Mitch Miller  
W.T. Campbell, Jr.  
James A. Bradford  
Matthew F. Carroll





## **SALIENT FACTS AND CONCLUSIONS**

<b>Subject Property Ownership</b>	Eastern Alabama Railway, LLC Talladega County, Alabama
<b>Rights Appraised</b>	For purposes of this report Assumed fee simple estate
<b>Date of Value Estimate</b>	April 4, 2011
<b>Date of Inspection</b>	April 4, 2011
<b>Area of Taking</b>	.0821 acres
<b>Improvements</b>	Railroad Tracks
<b>Zoning</b>	None
<b>Annual Tax Liability</b>	Unattainable
<b>Highest and Best Use</b>	Railroad Corridor
<b>Estimated Market Values:</b>	
<b>"Before" Value</b>	
Land	\$1,067
Improvements	<u>\$5,483</u>
Total "Before" Value	\$6,550
<b>"After" Value</b>	
Land	\$1,067
Improvements	<u>\$5,483</u>
Total "After" Value	<u>\$6,550</u>
<b>Difference in the "Before" and "After"</b>	<b>\$0</b>
<b>Total Compensation Due</b>	<b>\$0</b>

**EXHIBIT F-COMPLAINT**

UTILITIES BOARD OF THE CITY  
OF SYLACAUGA,  
a corporation,

Plaintiff,

v.

EASTERN ALABAMA RAILWAY,  
LLC, ET AL.,

Defendants.

IN THE PROBATE COURT FOR  
TALLADEGA COUNTY, ALABAMA

CASE NO.: \_\_\_\_\_

FILED  
08/23/2011 04:16 PM  
BILLY L. ATKINSON  
PROBATE JUDGE  
TALLADEGA County, ALABAMA

**COMPLAINT FOR CONDEMNATION**

Comes now Utilities Board of the City of Sylacauga ("Utilities Board"), a municipal corporation of the state of Alabama, and files this complaint against Eastern Alabama Railway, LLC ("EARY") and all others claiming an interest in the land described below, for an order of condemnation of the lands, rights, and interests therein, hereinafter described, and shows unto the Court as follows:

**ARTICLE FIRST:** That the plaintiff, Utilities Board, is a municipal corporation organized and existing under the laws of the State of Alabama, with its principal place of business in Talladega County, Alabama.

That the following party against whom this complaint is filed is a domestic limited liability company doing business in the State of Alabama:

<b><u>NAME</u></b>	<b><u>ADDRESS</u></b>	<b><u>INTEREST</u></b>
Eastern Alabama Railway, LLC	2413 Hill Road Sylacauga, AL 35151	Owner of Interest in Property

**REGISTERED AGENT  
FOR SERVICE:**  
C T Corporation System  
2 North Jackson Street, Suite 605  
Montgomery, AL 36104

That the following person against whom this complaint is filed is over the age of nineteen (19), is of sound mind, and is a resident of the State of Alabama:

<b><u>NAME</u></b>	<b><u>ADDRESS</u></b>	<b><u>INTEREST</u></b>
Sally K. Flowers Revenue Commissioner	Talladega County Courthouse 1 Courthouse Square Talladega, AL 35161	Tax Lien

That the said defendants are the owners of, or the owners of an interest in or on, the land hereinafter described and herein set out.

**ARTICLE SECOND:** Plaintiff is a municipal corporation having the right by its charter to own, maintain, and operate a water and sewer system for customers in and contiguous to the City of Sylacauga, and the rights, ways and rights-of-way herein described are sought to be condemned for its water and sewer pipes, lines, and facilities for that purpose. Plaintiff has the right to condemn pursuant to section 11-50-314(11) of the 1975 Code of Alabama, as amended.

**ARTICLE THIRD:** That the uses and purposes for which the said land, rights and interests hereinafter described are to be condemned and taken are in connection with the construction, operation and maintenance of subterranean water and sewer pipes, lines; facilities and other appliances necessary and convenient in connection therewith, and plaintiff therefore seeks to acquire ways and rights-of-way of 20 feet in width on, across, under and over the land as hereinafter described in Parcel 1 and Parcel 2 of Article Fourth hereof, and the right to construct and erect on, across, under and over said land such subterranean water and sewer pipes, lines and facilities, and all appliances necessary, convenient and useful in connection therewith for such purposes, together with all the rights conferred by law and all that are necessary, useful and convenient to the enjoyment of said rights, ways and rights-of-way for such uses and purposes.

The property described in Parcels 1 and 2 of Article Fourth, or a portion thereof or interest therein, has previously been subjected to a public use. Plaintiff alleges that there is an actual necessity that the lands described in Parcel 1 and 2 of Article Fourth be condemned for the purposes described herein, and Plaintiff further alleges that the uses and purposes to which such lands are sought to be condemned will not materially interfere with the public use to which such lands have previously been devoted.

**ARTICLE FOURTH:** That the said rights, ways, rights-of-way and other interests sought to be condemned for such uses and purposes are on, across, over, under and adjacent to strips of land described hereinafter, according to the final location survey of the said ways and rights-of-way heretofore made by the plaintiff, the said strips of land and the lands of which the same are a part being situated in Talladega County, Alabama, and described as follows:

**Parcel #1**

A 20 foot sewer line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 752.06 feet; thence proceed South 00° 47' 22" West for a distance of 97.03 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said sewer line easement and the point of beginning. From this beginning point proceed South 23° 41' 31" East along the centerline of said sewer line easement for a distance of 100.59 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #1, the property sought to be taken, and any remainder is attached to this complaint as Exhibit A.

The said EARY and Sally K. Flowers, as Revenue Commissioner, are the owners of the land described above and/or of an interest on or in said lands.

**Parcel #2**

A 20 foot water line easement being 10 feet in equal width on each side of the following described line: Commence at a concrete monument in place being the Northwest corner of Section 35, Township 21 South, Range 3 East, Talladega County, Alabama; thence proceed South 89° 12' 38" East along the North boundary of said quarter-quarter section for a distance of 762.46 feet; thence proceed South 00° 47' 22" West for a distance of 93.49 feet a point on the Northerly boundary of a railroad right-of-way, said point being the centerline of said water line easement and the point of beginning. From this beginning point proceed South 23° 43' 13" East along the centerline of said water line easement for a distance of 100.83 feet to a point on the Southerly boundary of said railroad right-of-way.

A diagram portraying Parcel #2, the property sought to be taken, and any remainder is attached to this complaint as Exhibit A.

The said EARY and Sally K. Flowers, as Revenue Commissioner, are the owners of the land described above and/or of an interest on or in said lands.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that this Court will make and enter an order appointing a day for the hearing of this complaint; that a copy of the complaint and notice of hearing date be served upon the defendants; and that upon such hearing, an order will be made by this Court condemning to the uses and purposes of this plaintiff, all the rights, authority and power sought and described herein, and for such other and further orders as may be authorized by law.

UTILITIES BOARD OF  
THE CITY OF SYLACAUGA

By   
Attorney for Plaintiff

**OF COUNSEL:**

**W.F. CAMPBELL, JR.**  
Attorney at Law  
400 West Third Street  
Sylacauga, Alabama 35150  
(256) 245-5268

**BALCH & BINGHAM LLP**  
James A. Bradford  
Matthew F. Carroll  
David R. Burkholder  
P. O. Box 306  
Birmingham, Alabama 35201  
(205) 251-8100

STATE OF ALABAMA     )  
JEFFERSON COUNTY    )

Before me, the undersigned authority, personally appeared, MATT CARROLL, who being by me first duly sworn, deposes and says that he is one of the attorneys for the plaintiff, Utilities Board of the City of Sylacauga, and has the authority to make this affidavit and to institute and prosecute the foregoing Complaint for the condemnation of the lands, rights, and interests therein described, and that the statements contained in the foregoing complaint are true and correct as therein alleged or upon information and belief as therein alleged.

Sworn to and subscribed before me this 23<sup>rd</sup> day of August, 2011

Pracy D. White  
Notary Public

My Commission Expires: 5-1-15

**UTILITIES BOARD OF THE CITY  
OF SYLACAUGA,  
a corporation,**

**Plaintiff,**

**v.**

**EASTERN ALABAMA RAILWAY,  
LLC, ET AL.,**

**Defendants.**

**IN THE PROBATE COURT FOR  
TALLADEGA COUNTY, ALABAMA**

**CASE NO.:** \_\_\_\_\_

**EXHIBIT A TO  
COMPLAINT FOR CONDEMNATION**





**EXHIBIT G-COURT ORDER**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
EASTERN DIVISION**

**UTILITIES BOARD OF THE CITY OF  
SYLACAUGA, a municipal corporation,**

**Plaintiff,**

**v.**

**EASTERN ALABAMA RAILWAY, LLC,  
a limited liability company, et al.,**

**Defendant.**

**CASE NO.: 1:11-cv-03192-RBP**

**ORDER REFERRING CASE TO SURFACE  
TRANSPORTATION BOARD**

Before the court are Plaintiff Utilities Board of the City of Sylacauga ("Plaintiff" or "Utilities Board")'s Motion to Remand filed on October 3, 2011 and Defendant Eastern Alabama Railway, LLC ("Defendant" or Eastern Alabama)'s Motion to Refer this case to the Surface Transportation Board filed on November 15, 2011.

This court stays further consideration of the subject matter jurisdiction issue and the motion to remand prior to any declaration, advisory opinion, or declination to consider of the STB. The court refers this case to the Surface Transportation Board ("STB") to determine whether the ICCTA preempts the Board's state court condemnation action and related issues.<sup>1</sup> The court also orders the parties to provide the STB with a copy of this order and the memorandum opinion that accompanies it and to take all necessary steps to bring the referred issue before the STB.

The court also **orders** that the pending motions in this case are stayed pending the STB's

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<sup>1</sup> The court is, of course, amenable to the STB's consideration of any issues raised by the parties which the STB is willing to address.

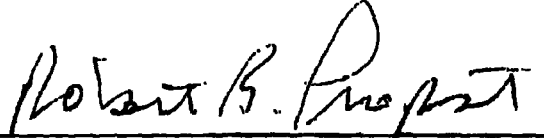
decision.

If the STB determines that the Board's claims are not preempted, the court will remand the case to the Talladega County Probate Court. If the STB renders any other decision or declines to render a decision, the court will further consider the case.

The court **ORDERS** the parties to notify the court of the status of proceedings before the Surface Transportation Board when the Board makes its ruling or after ninety (90) days have passed from the entry of this order, whichever comes first.

It is the intent of this court to refer all matters and issues for decisions, rulings, declarations and orders to the extent of the authority of the STB to address, declare, rule and order with regard thereto.

**DONE and ORDERED** this the 17<sup>th</sup> day of November, 2011.

  
\_\_\_\_\_  
**ROBERT B. PROPST**  
**SENIOR UNITED STATES DISTRICT JUDGE**



connection therewith, and plaintiff therefore seeks to acquire ways and rights-of-way of 20 feet in width on, across, under and over the land as hereinafter described in Parcel 1 and Parcel 2 of Article Fourth hereof, and the right to construct and erect on, across, under and over said land such subterranean water and sewer pipes, lines and facilities, and all appliances necessary, convenient and useful in connection therewith for such purposes, together with all the rights conferred by law and all that are necessary, useful and convenient to the enjoyment of said rights, ways and rights-of-way for such uses and purposes.

The property described in Parcels 1 and 2 of Article Fourth, or a portion thereof or interest therein, has previously been subjected to a public use. Plaintiff alleges that there is an actual necessity that the lands described in Parcel 1 and 2 of Article Fourth be condemned for the purposes described herein, and Plaintiff further alleges that the uses and purposes to which such lands are sought to be condemned will not materially interfere with the public use to which such lands have previously been devoted.

Eastern Alabama filed a Notice of Removal on September 2, 2011 pursuant to 28 U.S.C. § 1441(b) based on federal question jurisdiction under 28 U.S.C. § 1331. It argues the action is completely preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 42 U.S.C. § 10101 *et seq.* Eastern Alabama then filed an answer on September 8, 2011 which included affirmative defenses and a counterclaim for declaratory and injunctive relief. Utilities Board filed an Objection and Answer to Eastern Alabama's Counterclaim on September 29, 2011 and a Motion to Remand the action on October 3, 2011, arguing that this court lacks subject-matter jurisdiction over this action because the action is not preempted by federal law, and that Eastern Alabama's removal was procedurally defective because it did not obtain the consent to removal of all defendants.

#### SUMMARY OF THE ARGUMENTS<sup>1</sup>

##### PLAINTIFF

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<sup>1</sup> This court has not included all arguments and citations of the parties addressed in briefs, proposed orders, proposed opinions, etc.

First, Utilities Board argues that the particular condemnation action it seeks against Eastern Alabama is not preempted by federal law. It argues that the United States Supreme Court has only held three statutes to transform state law claims into federal claims based on the doctrine of complete preemption and that the ICCTA is not one of them. Eastern Alabama, it claims, relies on a "fundamental misunderstanding of the difference between *complete* preemption, which is sufficient for removal jurisdiction, and *ordinary*, or defensive preemption, which cannot confer federal subject-matter jurisdiction." Eastern Alabama has only explained how the courts and the Surface Transportation Board ("STB"), the agency responsible for enforcing the ICCTA, have analyzed ordinary preemption issues under categorical preemption and as applied preemption, but has not extended its analysis to complete preemption.

The preemption provision contained in the ICCTA is "not nearly as sweeping as [Eastern Alabama] suggests." Moreover, the mere presence of a preemption provision in a statute does not automatically entail preemption (citing *Island Park, LLC v. CSX Transportation*, 559 F.3d 96, 101 (2nd Cir. 2009)). The ICCTA's preemption provision extends only "to the regulation of rail transportation, not to all things incidentally related to railroads," (citing 49 U.S.C. § 10501(b)). ("Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.") (Emphasis added)). Specifically, the ICCTA does not preempt a claim unless it *interferes* with the railroad's operations." (emphasis in original)(citing *Island Park*, 559 F.3d at 104). According to Utilities Board, courts and the STB have determined that underground sewer crossings such as the one it seeks to install on Eastern Alabama's land do not interfere with railroad operations. (citing STB Order, *Lincoln Lumber Co.*, 2007 WL 2299735, at \*2 (Aug. 10,

2007).

DEFENDANT

Eastern Alabama argues that the ICCTA, which abolished the Interstate Commerce Commission and replaced it with the STB, extended exclusive federal jurisdiction to matters relating to rail transportation which had formerly been reserved for State jurisdiction, (citing 49 U.S.C. § 1050(b)). Eastern Alabama asserts that its use of the property in question constitutes "rail transportation" within the meaning of the ICCTA's preemption provision. Moreover, "the preemptive effect of the ICCTA is broad and sweeping," (citing *CSX Transp. Inc. v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581-84 (N.D. Ga. 1996)). Both the express terms of the ICCTA and decisions by several courts and the STB indicate that Congress intended the ICCTA to preempt state law specifically in the case of condemnation.

Furthermore, Eastern Alabama argues that Utilities Board's proposed condemnation *will* interfere with railroad operations:

Here, the property sought to be condemned by the Utilities Board is necessary to the operation and maintenance of active mainline tracks along the Eastern Alabama Railway which is used for freight services between Sylacauga, Alabama and Talladega, Alabama. The taking of this property would impair and inhibit the ability of Eastern Alabama to utilize the property for current and future railroad operations and maintenance or potential expansions or enhancement to the Eastern Alabama Railway. After the taking, the presence of the water and sewer pipes "on, across, under, and over" (*see* Complaint for Condemnation) the mainline tracks would pose serious operating, safety and maintenance concerns.

Eastern Alabama states that, "[t]he Utilities Board's argument misapprehends the scope of the doctrine of primary jurisdiction which does not divest a federal court of original subject matter jurisdiction or removal jurisdiction over matters governed by the ICCTA." Eastern Alabama is seeking in its counterclaim an order from this court "(1) declaring that the [STB] has

exclusive jurisdiction to decide whether the Utilities Board may condemn the railroad property at issue, and (2) enjoining the Utilities Board from proceeding in an Alabama state court to condemn the property at issue..." There is no resulting inconsistency between the relief sought in this court and the jurisdiction of the STB.

Eastern Alabama argues that the tax collector was either a nominal party or was fraudulently joined because she does not have an interest in the property that the Utilities Board is seeking to condemn.

#### **MOTION TO REMAND STANDARD**

Federal courts are courts of limited jurisdiction. *See Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001). Therefore, federal courts have power to hear only those cases that they have been authorized to hear by the Constitution or by Congress. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The limited nature of federal court jurisdiction has caused the Eleventh Circuit to favor remand of removed cases where federal jurisdiction is not absolutely clear. *Russell Corp.*, 264 F.3d at 1050. The removal statute is to be construed narrowly with doubt construed against removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107-09 (1941); *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999).

A case may be removed to federal court only if the case could have been brought originally in federal court pursuant to the court's diversity or federal question jurisdiction. *See* 28 U.S.C. § 1441(a). The determination of whether federal jurisdiction exists must be made on the face of the plaintiff's well-pleaded complaint. *Pacheco De Perez v. AT & T Co.*, 139 F.3d 1368, 1373 (11th Cir. 1998). An anticipated or even inevitable federal defense generally will not



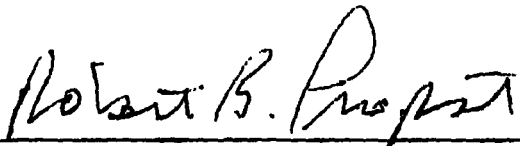
support removal. *Id.* at 1373 (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93 (1987)).

The burden of establishing federal jurisdiction is placed on the defendant, with all doubts resolved in favor of remand, *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996).

#### CONCLUSION

The court has considered the briefs, etc. filed by the parties and conducted a recorded telephone conference on November 16, 2011. This court is persuaded by Judge Proctor's cited order. The court will refer issues to the Surface Transportation Board. The court will stay further consideration of the remand motion until the STB has either rendered a declaration or declined the reference.

This the 17<sup>th</sup> day of November, 2011.

  
\_\_\_\_\_  
ROBERT B. PROPST  
SENIOR UNITED STATES DISTRICT JUDGE

**EXHIBIT H-DISCOVERY RESPONSE**

122

IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

EASTERN ALABAMA RAILWAY, INC., )

Plaintiff, )

vs. )

CITY OF SYLACAUGA UTILITIES BOARD, )

Defendant. )

CIVIL ACTION NO.:  
CV-2009-900252

**DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST SET OF  
INTERROGATORIES AND REQUESTS FOR PRODUCTION**

Defendant City of Sylacauga Utilities Board ("Defendant") responds to Plaintiff Eastern Alabama Railway, Inc.'s ("Plaintiff") First Set of Interrogatories and Requests for Production as follows:

**General Objections**

1. Defendant objects to Plaintiff's discovery requests to the extent the included definitions and instructions are inconsistent with normal English usage and/or seek to impose obligations beyond those required by the Alabama Rules of Civil Procedure. Defendant will interpret and answer the requests in accordance with normal English usage and the applicable rules.

2. Defendant objects to Plaintiff's requests to the extent they seeks the production or description of documents protected by the attorney-client privilege, that constitute work product, or that are otherwise privileged or protected from disclosure.

3. Defendant objects to Plaintiff's requests to the extent they are overly broad, unduly burdensome, and as improperly seeking a marshalling of the evidence.

4. Defendant objects to Plaintiff's requests as vague and ambiguous. Among other things, Plaintiff has failed to identify the land(s)/utilities at issue in the lawsuit.

5. Defendant objects to these requests as premature. Discovery in this matter is ongoing. Further, EARY has failed to produce documents, failed to identify the lands/utilities at issue, and/or failed to provide other information necessary to respond to these requests. Defendant expressly reserves the right to supplement and/or amend each of the responses below as additional information becomes available through discovery, including, but not limited to, the information specifically identified above.

### **INTERROGATORIES**

1. Is Defendant's name correctly stated in the Complaint? If not, please state your correct name.

**RESPONSE:** The Defendant's correct name is The Utilities Board of the City of Sylacauga.

2. Identify each and every person who provided information or otherwise assisted with the preparation of your responses to these Interrogatories and/or Requests for Production of Documents.

**RESPONSE:** Mike Richard, with the assistance of the Utilities Board's counsel.

3. Describe the Utilities Board's current business structure and organization.

**RESPONSE:** The Utilities Board objects to this interrogatory as vague, ambiguous, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board further objects because the information requested may be derived from documents and the burden of deriving said information is substantially the same for either party. Subject to those objections and its general objections above, the Utilities

Board is a municipal utility board pursuant to the Alabama Code. In further answer, please see the Utilities Board's charter, which it will provide to EARY.

4. Identify any and all entities that have governed or managed the City of Sylacauga's utilities prior to the Utilities Board, stating the dates each entity governed/managed the City's utilities and the business structure and organization of each entity.

**RESPONSE:** The Utilities Board objects to this interrogatory as vague, ambiguous, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving those objections and its general objections above, to the Utilities Board of Sylacauga's knowledge, on August 5, 1952 the City of Sylacauga transferred its natural gas facilities to "The Gas Board of the City of Sylacauga". On April 8, 1955 the "The Gas Board of the City of Sylacauga" amended its articles of incorporation to change its name to "The Utilities Board of the City of Sylacauga." On about that same time, the City of Sylacauga transferred its water and electric systems to the Board. On May 7, 1980 the City of Sylacauga transferred its sanitary sewer system to the Utilities Board of the City of Sylacauga.

5. Identify each and every contract or agreement that you, or your predecessors, have entered into at any time with any person or entity, including without limitation any license agreements or deeds, regarding or relating in any way to the Parcels or Encroachments, identifying all persons with knowledge or information about each such contract or agreement, and all documents which constitute, evidence, relate to or contain information about each such contract or agreement.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, vague, ambiguous, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board further objects because the information requested, to the extent relevant, may be derived from documents and the burden of deriving said information is substantially the same for either party. Subject to those objections and its general objections above, the Utilities Board will produce any license agreements it has with EARY and/or its predecessors and refers EARY to same.

6. If you contend that EARY did not comply with its obligations or duties under any of its agreements or contracts with the Utilities Board, please specify the section or provision of the agreement or contract that was violated by EARY and describe the conduct that you contend constituted a breach.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, and vague. The Utilities Board further objects to this contention interrogatory as premature because discovery is just beginning in this matter and EARY has failed to identify the land/utilities at issue in this litigation. Subject to and without waiving those objections and/or its general objections above, based on information available to it at the present time, in general the Utilities Board believes that EARY has breached its agreements with the Utilities Board and/or its obligations of good faith thereunder by representing to the Utilities Board that its has deeds which give it fee simple ownership of the land over which its railroad tracks run when it does not, by demanding that the Utilities Board pay rent and/or make other payments not provided for in the parties' license agreements as a condition of maintaining its utilities on land claimed by

EARY, and/or making other demands on the Utilities Board inconsistent with the terms of those agreements.

7. Identify each of your occupancies upon EARY's right-of-way. For each occupancy, please state the following:

- (a) the location of each occupancy;
- (b) the use and purpose of the occupancy;
- (c) when the occupancy began;
- (d) any agreement(s) with EARY or its predecessors allowing, authorizing, governing, or relating to the occupancy; and

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board further objects to this interrogatory as premature because EARY has failed to identify the land/utilities at issue in its complaint. The Utilities Board also objects because the information requested may be derived from documents and the burden of deriving said information is substantially the same for either party. Subject to and without waiving those objections and/or its general objections above, the Utilities Board will produce documents sufficient to identify any facility it understands to have on land EARY claims to own in fee simple once EARY has identified the land(s)/utilities at issue in its complaint.

8. Identify all documents in your possession, custody, or control that relate in any way to the Encroachments, including without limitation any and all leases, licenses, memoranda, letters, emails, rental payments by you, surveys, construction contracts, construction drawings,

communications regarding the construction, communications concerning the maintenance, and anything else that relates to or contains information about any of the Encroachments.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, vague, ambiguous, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board further objects because the information requested may be derived from documents and the burden of deriving said information is substantially the same for either party. The Utilities Board also asserts the attorney-client privilege and/or attorney work product exemption to the extent applicable. Subject to and without waiving those objections and/or its general objections above, the Utilities Board will produce documents sufficient to identify any facility it understands to have on land EARY claims to own in fee simple once EARY has identified the land(s)/utilities at issue in its complaint.

9. Identify any and all communications, oral or written, between you and any person or entity regarding or relating in any way to the Encroachments, identifying the date and time of such communications; the agent, employee, representative, attorney or other person with whom you communicated; the contents or subject matter of such communications; all persons with knowledge or information regarding such communications; and all documents which evidence, constitute, relate to or contain information about such communications.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, vague, ambiguous, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board further objects because the information requested may be derived from documents and the



burden of deriving said information is substantially the same for either party. The Utilities Board also asserts the attorney-client privilege and/or attorney work product exemption to the extent applicable. Subject to and without waiving those objections or its general objections above, the Utilities Board will produce any non-privileged documents in its custody, control, and/or possession reflecting communications with EARY and/or its predecessors in interest regarding the land(s)/utilities at issue in this lawsuit once EARY has identified same.

10. State each and every fact that you assert supports your legal right to occupy EARY's right-of-way at the present time.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, vague, and ambiguous. The Utilities Board further objects to this contention interrogatory as premature, since discovery in this matter is ongoing and because EARY has failed to identify either the utility crossings at issue in this matter and/or to define what it describes as "EARY's right-of-way." Subject to and without waiving those objections and/or its general objections above, among other things, the Utilities Board has the legal right to occupy certain lands that EARY claims to own in fee simple and/or are otherwise at issue in this litigation because (1) EARY does not own the land in question, including, but not limited to, those lands EARY claims by or through deeds between its predecessor(s) in title and M.F. Harris, J.W. Bigsby, E.F. Cooley (2), W.J. Cannon, the Sylacauga Improvement Co., J.A. Knight, J.M. Lanning, L.H. Crumpler, and John Howell, (2) EARY is estopped from objecting to the presence of the Utilities Board's facilities on the land it claims by its prior words, conduct, and/or agreements, including its representation that the Utilities Board could maintain facilities on, over, or under land claimed by EARY if it complied with certain conditions, (3) EARY has

no right to object to the presence of the Utilities Board's Utilities on land claimed by EARY in this action based on the Utilities Board's failure to pay the rent or "license fees" demanded by EARY, and/or (4) the Utilities Board has established an easement over, under, or across the lands in question by adverse possession. In further answer, see the Utilities Board's answer and counterclaim in this action.

11. State each and every fact that you assert supports your claim of property rights based on adverse possession or prescription with regard to each of the Parcels, separately and severally.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, vague, and ambiguous. The Utilities Board further objects to this contention interrogatory as premature, since discovery in this matter is ongoing and EARY has failed to identify the land(s)/utilities at issue in this litigation. Subject to and without waiving those objections or its general objections above, in general the Utilities Board has a prescriptive easement over any parcel of land that EARY owns in fee simple over, under, or through which the Utilities Board has had its facilities for the relevant prescriptive period in an open, exclusive, and adverse manner to EARY. *See also* the Utilities Board's Response to EARY's previously filed Motion for Summary Judgment and the affidavit testimony in support of that motion.

12. Identify who is responsible for maintaining, servicing, and repairing the Utilities Board's installations and occupancies on the Parcels.

**RESPONSE:** In addition to its general objections above, the Utilities Board objects to this interrogatory as vague, ambiguous, and as seeking information that is neither relevant nor

reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board further objects to this interrogatory as premature, since discovery in this matter is ongoing and because EARY has failed to identify the land(s)/utilities at issue in this lawsuit.

13. At all times since each individual Encroachment was built or installed, explain how maintenance or other personnel service each occupancy and how often each is maintained.

**RESPONSE:** In addition to its general objections above, the Utilities Board objects to this interrogatory as overly broad, unduly burdensome, vague, ambiguous and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

14. Identify all persons who performed any work or maintenance at your request or on your behalf in connection with the Encroachments or Parcels and describe each such person's position(s), responsibilities, and activities in connection with said work, along with the dates that said activities began and ended.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, vague, ambiguous and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

15. Identify any and all communications, oral or written, between you and Eagle 1 Resources, and you and Mr. Dave Thomas, regarding or relating in any way to the Parcels, separately or severally, the Encroachments and/or any of the factual or legal matters at issue in this lawsuit, identifying the date and time of such communications, the content or subject matter

of such communications, and all documents which evidence, constitute, relate to or contain information about such communications.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad, unduly burdensome, vague, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board further objects to this interrogatory as premature, since discovery in this matter is ongoing and EARY has failed to identify the land/utilities at issue in this litigation. The Utilities Board also objects because the information requested may be derived from documents and the burden of deriving said information is substantially the same for either party. Subject to and without waiving those objections or its general objections above, the Utilities Board's will produce copies of any communications between the Utilities Board and Mr. Thomas that are in the Utilities Board's custody, control, and/or possession and refers EARY to same.

16. List all persons known to you to have knowledge of facts relevant to any material issue, claim or defense in this case, describing for each such person the facts purportedly known by him or her.

**RESPONSE:** The Utilities Board objects to this interrogatory as premature as discovery is ongoing and EARY has failed to identify either the parcels or the utilities at issue in this litigation. The Utilities Board further objects to this interrogatory as overly broad and unduly burdensome to the extent it asks the Utilities Board to identify all relevant facts. Subject to and without waiving this objection, the following individuals are known to have relevant information at the present time:

Eastern Alabama Railway, LLP  
2413 Hill Road

Sylacauga, AL 35151

Among other things, Eastern Alabama Railway, LLP has knowledge concerning it and RailAmerica's efforts to increase revenue by seeking to impose rent and/or "license fees" on utilities and others, its representations to own the land underneath its tracks in fee simple, it and its and/or its predecessors' prior dealings, conduct, and/or representations to the Utilities Board, its license agreements with the Utilities Board, its claims to have incurred burdens and expenses maintaining the Utilities Board's facilities, and all other allegations stated in its complaint.

RailAmerica, Inc.  
7411 Fullerton Street  
Jacksonville, Florida 32256

Among other things, RailAmerica has knowledge concerning it and its subsidiaries efforts to increase revenue by seeking to impose rent and/or "license fees" on utilities and others in connection with land that its subsidiaries claim to own in fee simple, EARY's claims to own the land underneath its tracks in fee simple, it and/or its predecessors' prior dealings, conduct, and/or representations to the Utilities Board, EARY's license agreements with the Utilities Board and others, its claims to have incurred burdens and expenses maintaining the Utilities Board's facilities, and all other allegations stated in Eastern Alabama Railway, LLP's complaint.

Kenneth Charron  
RailAmerica, Inc.  
7411 Fullerton Street  
Jacksonville, Florida 32256

Among other things, Mr. Charron has knowledge concerning EARY's claim to own the land underneath its railroad tracks in fee simple, its recent dealings with the Utilities Board, and the Utilities Board's facilities on, under, and/or near land claimed by EARY, and/or the land/utilities at issue in EARY's complaint.

Stacy Korpai  
RailAmerica, Inc.  
7411 Fullerton Street  
Jacksonville, Florida 32256

Among other things, Ms. Korpai has knowledge concerning EARY and/or RailAmerica's dealings with the Utilities Board, EARY and/or RailAmerica's claim to own the land underneath its railroad tracks in fee simple, and the Utilities Board's facilities on, under, and/or near land claimed by EARY, and the land/utilities at issue in EARY's complaint.

Mike Bagley  
RailAmerica, Inc.  
7411 Fullerton Street  
Jacksonville, Florida 32256

Mr. Bagley has knowledge concerning EARY and/or RailAmerica's dealings with the Utilities Board, EARY and/or RailAmerica's claim to own the land underneath its railroad tracks in fee simple, and the Utilities Board's facilities on, under, and/or near land claimed by EARY.

Larry Nordquist  
Eastern Alabama Railway, LLP  
2413 Hill Road  
Sylacauga, AL 35151

Mr. Nordquist has knowledge concerning EARY's dealings with the Utilities Board, and the Utilities Board's facilities on, under, and/or near land claimed by EARY.

Michael Richard  
Utilities Board of Sylacauga  
Contact may be made  
through counsel

Mr. Richard has knowledge concerning the Utilities Board's recent dealings with EARY and knowledge concerning its facilities.

Mitch Miller  
Utilities Board of Sylacauga  
Contact may be made  
through counsel

Mr. Miller has knowledge concerning the Utilities Board's recent dealings with EARY and knowledge concerning its facilities.

David Thomas  
Eagle 1 Resources  
2155 Herndon Street  
Auburn, AL 36830  
Tel. 334.887.0328  
Fax. 334.466.0012  
Mobile. 334.546.8166

Mr. Thomas has knowledge concerning the Utilities Board's recent dealings with EARY and EARY's claims to own the land underneath its tracks in fee simple.

17. Identify each and every potential witness in this litigation known to you and describe specifically the area or areas of potential testimony for each, and the documents to be relied upon, if any.

**RESPONSE:** The Utilities Board objects to this interrogatory as overly broad and vague. It further objects to this request as premature as discovery is ongoing and EARY has failed to identify the land/utilities at issue. The Utilities Board further objects to this interrogatory as overly broad to the extent it asks the Utilities Board to identify all areas of testimony and documents. Subject to and without waiving those objections or its general objections above, see the Utilities Board's response to interrogatory No. 16 for the identity of those individuals with relevant knowledge known to the Utilities Board at the present time. The Utilities Board reserves the right to supplement its response to this request as additional information becomes available through discovery, including the production of information by EARY.

18. Identify all expert witnesses you anticipate calling to testify at the trial of this cause. For each such expert, please state the following:

- (a) the subject matter on which each expert is expected to testify;
- (b) the substance of the opinions to which each expert is expected to testify;
- (c) all facts upon which each expert's opinions are based; and
- (d) all treatises, papers, articles, pamphlets, websites, materials, documents or any other sources of information that any of your experts consulted, reviewed, or otherwise relied upon in any way to analyze any issue in this case or to formulate any opinions.

**RESPONSE:** The Utilities Board objects to this interrogatory as premature and as improperly seeking discovery of information beyond the bounds permissible under Ala. R. Civ. P. 26. Subject to and without waiving that objection and/or its general objections above, the Utilities Board has made no determinations regarding experts at the present time. The Utilities Board reserves the right to supplement this response at the appropriate time.

19. Identify any agency and/or persons who have conducted any investigation into the ownership and/or occupancy rights related to the Parcels and/or Encroachments, and state the results of the investigation(s) and identify all documents which constitute, evidence, relate to or contain information about any such investigation(s).

**RESPONSE:** The Utilities Board objects to this request as vague and ambiguous. It further objects to this request as premature. EARY has failed to identify the land/ utilities at issue in this litigation. The Utilities Board further objects because the information requested may be derived from documents and the burden of deriving said information is substantially the same for either party. It also asserts attorney-client privilege and/or attorney work product. Subject to and without waiving those objections or its general objections above, in general, Eagle One Resources has conducted an investigation into EARY's claim to own various lands in Talladega County in fee simple. In further answer, see the Utilities Board's document production in this matter for copies of any non-privileged communications between the Utilities Board and Mr. Dave Thomas of Eagle One Resources that are in the Utilities Board's custody, control, and/or possession.

20. Identify and describe all surveys or other studies that have been conducted by you or on your behalf regarding or relating in any way to the Parcels and/or Encroachments, indentifying the dates and times any such studies were conducted the person(s) or entities conducting each such study, and all documents which constitute, evidence, relate to or contain information about any such studies, and describing in detail the results of each such study and/or what each study revealed.



**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. It further objects to this request as premature. EARY has failed to identify the land/utilities at issue in this litigation. It also asserts attorney-client privilege and/or attorney work product. Subject to and without waiving those objections or its general objections above, Ray and Gilliland Surveyors have performed certain survey work in relation to EARY's claim to own various lands in Talladega County in fee simple.

21. State what you contend to be the reasonable rental rate for each individual Encroachment, describing in detail how you arrived at or calculated such rate; identifying all persons who you contend have knowledge or information about the prior rental rates; and identifying all documents and comparables which you contend support, evidence, relate to or contain information about your assessment of the reasonable rental rate.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

22. Identify all appraisals performed relating to the Parcels and/or Encroachments at any time from 2000 to present, and identify all documents which constitute, evidence, relate to or contain information about each such appraisal.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

23. State what you contend to be the value of the service provided by each individual Encroachment and describe in detail how you arrived at or calculated such value.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

24. For each Encroachment, describe any adverse economic effect which would be suffered by the defendant if the Encroachment were terminated and/or removed.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

25. For each Encroachment, state the number of people who would be adversely effected by terminating and/or moving said Encroachment and give the type of utility service currently provided that would not be available.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

26. Do you contend that the only means of providing utility service is via the Parcel(s)? If so, state all facts and circumstances which you contend support this assertion.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

27. With respect to each of the Encroachments, describe the effect of ceasing to occupy the Parcels and state whether an alternative route is available.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

28. If you were no longer able to occupy the Parcels, separately and severally, state the manner in which your customers could be served and provided the same utilities made the subject of the Encroachments, separately and severally. Fully and completely describe how you contend your occupation on the Parcels should be remedied and whether your suggested remedies will effect the value of the Parcels, EARY's use of its right-of-way, and EARY's ownership rights in the Parcels.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

29. State whether it is possible to eliminate certain Encroachments and still provide the utilities service to your customers.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

30. For each prescriptive easement claimed in your Counterclaim, please state the following:

- (a) the location of each easement;
- (b) the use and purpose of each easement;
- (c) when your use of each easement began;
- (d) when you contend your use of each easement was first "open, continuous, exclusive, uninterrupted, and adverse" to EARY or any predecessor in interest, as stated in Paragraph 6 of the Counterclaim;
- (e) the name and address of the entity or entities to or against whom you openly, continuously, exclusively, and adversely claimed an interest in each easement;
- (f) any agreement(s) with EARY or its predecessors allowing, authorizing, governing, or relating to your use of each easement.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

31. For each prescriptive easement claimed in your Counterclaim, state each and every fact you assert supports your contention that "EARY has had actual or presumptive knowledge of the Board's utility lines" for the prescriptive period, as alleged in Paragraph 8.

**RESPONSE:** In addition to and without waiving other applicable objections and/or privileges, the Utilities Board objects to this interrogatory because Plaintiff has exceeded the forty interrogatories, including subparts, authorized by Alabama Rule of Civil Procedure 33(a).

### **REQUESTS FOR PRODUCTION**

1. Produce all statements, records, correspondence, reports and documents of any nature that were mentioned or in any way relate to your responses to EARY's interrogatories.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. It further asserts attorney-client privilege. Subject to and without waiving those objections or its general objections above, the Utilities Board will produce all non-privileged documents it reasonably understands to be responsive to this request.

2. Produce all documents that reflect or relate to the organization and/or structure of the Utilities Board and/or its predecessors, including, but not limited to, any probate court filings.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague, ambiguous and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections or its general objections above, the Utilities Board will produce a copy of its charter and all amendments thereto.

3. Produce all documents that relate to, are connected with, or concern EARY or its predecessors.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague, ambiguous and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board also

objects to this request to the extent it seeks information that is protected by the attorney-client privilege and/or the attorney work product exemption. Subject to and without waiving those objections or its general objections above, the Utilities Board will produce any non-privileged documents that the Utilities Board reasonably understands to concern the claims EARY states in its complaint against the Utilities Board once EARY has identified the land(s)/utilities at issue in its complaint.

4. Produce all correspondence and other documents given or sent to you by EARY or its predecessors, or given or sent by you to EARY or its predecessors.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague, ambiguous and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving those objections or its general objections above, the Utilities Board will produce any correspondence to or from EARY that the Utilities Board reasonably understands to concern the claims EARY states in its complaint against the Utilities Board once EARY has identified the land(s)/utilities at issue in its complaint.

5. Produce all documents which evidence or in any way relate to the relationship between EARY and its predecessors and the Utilities Board and its predecessors that relate to the occupancies for Encroachments, separately and severally, including, but not limited to, any grant of permission, license agreements, lease agreements, documents conveying property interests (such as easements or deeds), contracts, options, and any amendments thereto.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague, ambiguous and as seeking information that is neither relevant nor

reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board also objects to this request to the extent it seeks information that is protected by the attorney-client privilege and/or the attorney work product exemption. Subject to and without waiving those objections or its general objections above, the Utilities Board will produce any license agreements or other documents that are in its custody, control, and/or possession that convey or purport to convey property interests on land that EARY claims to own in fee simple once EARY has identified the land(s)/utilities at issue in its complaint.

6. Produce all documents that relate to, are connected with, or concern the installation, maintenance or occupancy of any Encroachment.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague, ambiguous and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board also objects to this request to the extent it seeks information that is protected by the attorney-client privilege and/or the attorney work product exemption. Subject to and without waiving those objections or its general objections above, the Utilities Board will produce documents sufficient to identify any Utilities Board facility it understands to have on land EARY claims to own in fee simple once EARY has identified the land(s)/utilities at issue in its complaint.

7. Produce all documents which constitute, evidence, relate to or contain information about any and all contracts, agreements, options, licenses, grants of permission, leases or understandings, oral or written, that you or your predecessors have entered into at any time, with any person or entity, regarding or relating in any way to the Encroachments and/or Parcels.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. The Utilities Board also objects to this request to the extent it seeks information that is protected by the attorney-client privilege and/or the attorney work product exemption. Subject to and without waiving those objections or its general objections above, the Utilities Board will produce any agreements in its custody, control, and/or possession concerning its right to maintain its utilities on land EARY claims to own in fee simply once EARY has identified the land(s)/utilities at issue in its complaint.

8. Produce any and all documents which constitute, evidence, relate to or contain information about any discussions, negotiations or other communications that you have had at any time, with any person or entity, regarding or relating in any way to your access to and/or use of the Parcels.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague, ambiguous, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board also objects to this request to the extent it seeks information that is protected by the attorney-client privilege and/or the attorney work product exemption. Subject to and without waiving those objections or its general objections above, the Utilities Board will produce any non-privileged documents in its custody, control, and/or possession which concern any communications concerning its right to maintain its utilities on land EARY claims to own in fee simply once EARY has identified the land(s)/utilities at issue in its complaint.



9. Produce all documents in your possession, custody, or control which constitute, evidence, relate to or contain information about any and all communications, oral or written, between you and Eagle 1 Resources, and you and Mr. Dave Thomas, regarding or relating in any way to the Parcels, the Encroachments and/or any of the factual or legal matters at issue in this lawsuit.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague, ambiguous, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board also objects to this request to the extent it seeks information that is protected by the attorney-client privilege and/or the attorney work product exemption. Subject to and without waiving those objections and its general objections above, the Utilities Board will produce any non-privileged communications between itself and Eagle One Resources in its custody, control, and/or possession.

10. Produce copies of all documents that you or your counsel have requested or received from Mr. Dave Thomas and/or Eagle 1 Resources, regarding or relating in any way to this lawsuit, the Parcels, the Encroachments, and/or EARY.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague, ambiguous, and as seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. The Utilities Board also objects to this request to the extent it seeks information that is protected by the attorney-client privilege and/or the attorney work product exemption. Subject to and without waiving those objections, the Utilities Board will produce any non-privileged communications between itself and Eagle One Resources in its custody, control, and/or possession.

11. Produce all documents which constitute, evidence, relate to or contain information about any lease, license, easement, or other property right which you contend you or your predecessors have ever obtained related to the Parcels.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. The Utilities Board further asserts attorney-client privilege and/or attorney work product. Subject to and without waiving those objections and its general objections above, the Utilities Board will produce any agreements in its custody, control, and/or possession concerning its right to maintain its utilities on land EARY claims to own in fee simply once EARY has identified the land(s)/utilities at issue in its complaint.

12. Produce all documents that you contend support your legal right to occupy each of the Encroachments or Parcels, separately and severally.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. The Utilities Board further asserts attorney-client privilege and/or attorney work product. Subject to and without waiving those objections and its general objections above, the Utilities Board will produce any non-privileged documents in its custody, control, and/or possession that it reasonably understands to be responsive to this request once EARY has identified the land(s)/utilities at issue in its complaint.

13. Produce all documents that you contend evidence or suggest that EARY does not have the right to grant a lease or license relative to the Parcels.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. The Utilities Board further asserts attorney-client privilege and/or attorney work product. Subject to and without waiving those objections and its general objections above, the Utilities Board will produce any non-privileged documents in its custody, control, and/or possession concerning EARY claims to own land in fee simple once EARY has identified the land(s)/utilities at issue in its complaint.

14. Produce all documents which evidence or in any way relate to any your computation of a reasonable rental rate, as stated in Interrogatory No. 21.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. Subject to and without waiving those objections, the Utilities Board has no documents responsive to this request.

15. Produce all documents reviewed, relied upon, or generated by any expert retained or consulted in connection with this lawsuit.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. It further objects to this request to the extent it seeks information protected by the attorney-client privilege, attorney work product, and/or otherwise seeks discovery of information protected from disclosure by Ala. R. Civ. P. 26. Subject to and without waiving those objections, the Utilities Board has no documents responsive to this request at the present time.

16. To the extent not already covered by Request No. 15, please produce all documents that support the opinion of any expert retained or consulted in connection with this lawsuit.

**RESPONSE:** See response to Request 15 above, which is incorporated herein.

17. Produce the curriculum vitae of any expert retained or consulted in connection with this lawsuit.

**RESPONSE:** See response to Request 15 above, which is incorporated herein.

18. Produce all documents related to any other lawsuits in which any expert retained or consulted in connection with this lawsuit has been retained.

**RESPONSE:** The Utilities Board objects to this request to the extent it seeks information protected by the attorney-client privilege, attorney work product, and/or otherwise seeks discovery of information protected from disclosure by Ala. R. Civ. P. 26. Subject to and without waiving those objections, the Utilities Board has no documents responsive to this request at the present time.

19. Produce all documents which you intend to introduce or rely upon at trial.

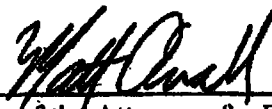
**RESPONSE:** The Utilities Board objects to this request as vague and ambiguous. It further objects to this request to the extent it seeks information protected by the attorney-client privilege, attorney work product, and/or otherwise seeks discovery of information protected from disclosure by Ala. R. Civ. P. 26. Subject to and without waiving those objections, the Utilities

Board has made no determinations regarding what documents it intends to introduce into evidence at trial at the present time.

20. Produce all documents evidencing or relating to any possessory right, including but not limited to any grant of permission, license, lease, or transfer of a property right and assignment of the same, in the property described in Paragraph 6 of the Counterclaim.

**RESPONSE:** The Utilities Board objects to this request as overly broad, unduly burdensome, vague and ambiguous. Subject to and without waiving those objections, the Utilities Board will produce any non-privileged documents in its custody, control, and/or possession it reasonably understands to concern its claim for adverse possession as to lands EARY claims to own in fee simple once EARY has identified the land(s)/utilities at issue in its complaint.

Respectfully submitted,



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One of the Attorneys for Defendant  
City of Sylacauga Utilities Board

**OF COUNSEL:**

W. T. Campbell, Jr.  
Attorney at Law  
400 W. Third Street  
Sylacauga, Alabama 35150  
Telephone: (256) 245-5267  
Facsimile: (256) 245-5268  
E-mail: [campwt@mindspring.com](mailto:campwt@mindspring.com)

**BALCH & BINGHAM LLP**

James A. Bradford  
Matthew F. Carroll  
Post Office Box 306  
Birmingham, Alabama 35201-0306  
Telephone: 205-251-8100  
Facsimile: 205-226-8799  
E-mail: [mcarroll@balch.com](mailto:mcarroll@balch.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served upon the following through  
by U.S. Mail, on this the 22<sup>nd</sup> day of March, 2010:

John F. De Buys, Jr.  
Turner B. Williams  
Jennifer E. Ziemann  
Burr & Forman LLP  
420 North 20<sup>th</sup> Street, Suite 3400  
Birmingham, Alabama 35203

Robert Rumsey  
Rumsey & Wilkins  
Post Office Drawer 1325  
Sylacauga, Alabama 35150

  
\_\_\_\_\_  
Of Counsel